Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 4, Original.

Ex parte The Farmers' Loan and Trust Co., Petitioner.

IN THE MATTER OF THE FARMERS' LOAN AND TRUST COMPANY

vs.

THE TEXAS CENTRAL RAILWAY COMPANY ET AL.

BRIEF FOR FARMERS' LOAN AND TRUST COMPANY

ON MOTION FOR MANDAMUS.

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Of Counsel.

Supreme Court of the United States.

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In the matter of THE FARMERS' LOAN AND TRUST COMPANY *vs.* THE TEXAS CENTRAL RAILWAY Co. et al.	No. 4. Original.

Brief for the Farmers' Loan and Trust Company.

This is a motion for a writ of mandamus to the Circuit Court of the United States for the Northern District of Texas, directing it to fix amount of bond to be given by the petitioner on appeal from a decree rendered in that Court.

In April, 1885, Morgans' Louisiana and Texas Railroad and Steamship Company (a Louisiana corporation), filed a bill in said Circuit Court against the Texas Central Railway Company (a Texas corporation), claiming, as an unsecured creditor, a lien for money loaned on all the property of the Railway Company paramount to the lien of two trust mortgages of prior date, held by the Trust Company. The bill averred insolvency, and asked the appointment of Receivers. Thereupon Messrs. Clarke and Dillingham were

appointed, and they still remain in charge of the property.

Subsequently the Trust Company came in as party defendant, filing an answer, and still later a cross-bill to foreclose its mortgages, substantially in the ordinary form.

The cause proceeded in due course upon bill and cross-bill, until April 11, 1887, when final decree of foreclosure and sale was rendered, adjudging the lien of the Trust Company's mortgage for over $4,000,000 to be the paramount lien, and that of the Morgan Company for some $750,000, to be junior. (See Decree, Return, Exhibit B, p. 7.)

The execution of this decree and sale of the property was stayed by supersedeas bonds, duly given by the Morgan Company and the Railway Company, on separate appeals taken by them to this Court. A motion filed in this Court in February, 1888, to advance the cause, was denied.

The Receivers remained in possession of the property pending the appeal. The Trust Company thereupon moved to be placed in possession. The motion was strenuously opposed, and when it was granted by the Circuit Judge, the attorneys of the Morgan Company and Railroad Company and of the Receivers, induced the Circuit Judge to grant a re-argument to be had before Mr. Justice Harlan. On the hearing before him, the motion was finally denied. These facts should be remembered when our opponents speak of the embarrassments under which the Receivers are placed in operating the road.

On February 15, 1888, Receivers filed a petition in the Court below (Return, Exhibit C, p. 19), asking leave to borrow $120,000 for the purpose of repairing the road. This petition was refered to a Master who reported that the prayer of the Receivers should be granted. The Trust Company filed exceptions. The

cause was argued May 26, 1888, the exceptions overruled and the decree complained of granted.

This decree (Petitioner's Exhibit B, p. 13) authorized the Receivers to borrow $120,000, and to issue certificates for the same bearing interest not to exceed six per cent. to fall due, at the option of the Receivers, on or before the expiration of two years, to be sold at not less than par, proceeds to be applied to the purposes of the necessary repairs and reconstructions recommended in the report of the Master; and it further orders "that said certificates and obligations, when issued, shall become, and they are declared to be, a lien upon the road-bed, rolling-stock, depots and all other property of said railway company, including the net earnings thereof after deducting expenses of this receivership and the operation of the road, said lien to be prior to all other liens except the lien for $25,000 of Receivers' certificates" previously allowed. The form of the certificate is recited.

Within a very few days after the entry of the order, the Trust Company presented to the Circuit Judge its Petition of Appeal (Petitioner's Exhibit A, p. 11), for an allowance of appeal from the decree of May 26, 1888, with a draft order for signature, leaving a blank to be filled with the sum in which the bond should be given if to operate as a supersedeas, and another blank for the sum in which it should be given if it were not so to operate. The Judge on due consideration denied the petition, and refused to fix the amount in which bonds should be given, writing an opinion (Petitioner's Exhibit C, p. 15). A re-hearing was had before the Supreme Court Justice for the Circuit and he concurred in the opinion of the Circuit Judge.

The above statement, it is believed, contains nothing which will not be conceded by the other side. Moreover we admit the "deplorable condition" of the property. It is in such a bad condition that the Court below is actually endeavoring to construct it anew, and

to create prior liens for that purpose, which is far beyond its power.

But while we make no opposition to the showing of the Court below in this respect, we call attention to the obvious fact that, some how or other, notwithstanding its condition, the road is actually operated, and seems to pay its way.

The Court below has attempted to create a prior lien of $120,000 on the property covered by our mortgage, and to prevent us from bringing up the matter for review. If it can do this, there is, we submit scarcely any limit to its "discretion."

We contend that the order in question is a final decree, and therefore appealable; that it is not a discretionary order; that the action which the Judge below was asked to perform, namely, to fix the amount of the bond, is merely perfunctory; that the writ of mandamus is the appropriate remedy, and that the bondholders have absolutely no protection whatever except by appeal.

POINTS.

First.

THE TRUSTEE HAS AN ABSOLUTE RIGHT TO APPEAL FROM THE ORDER IN QUESTION, AND THE ACTION OF THE JUDGE IN ALLOWING THE APPEAL IS MERELY PERFUNCTORY.

"An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, or of any District Court acting as a Circuit Court in cases of equity and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the Supreme Court is required to receive, hear and determine such appeal."

U. S. Revised Statutes, § 692.

The statute is peremptory. It recognizes an absolute right which the party may exercise at his volition and which is independent of judicial discretion.

United States vs. *Adams*, 6 Wall., 101.

But it is contended that the decree permitting the issue of the certificates is not a *final decree* within the meaning of the statute.

I.

In the first place that question is not for the Circuit Judge to determine. If an appeal does not lie from the decree, the remedy is by application to this Court to dismiss the appeal.

Simmons vs. *Burlington, Cedar Rapids and Northern*, 123 U. S., 52.

When a petition of appeal is presented to the Circuit Judge, he is, in fact, simply asked to fix the amount of the bond. This is practically all his duty. The "allowance" of the appeal is a matter of course. He has no discretion as to whether or not he will allow it.

"When the Court has rendered its judgment, either party may appeal, that is, has the right of appeal, and may exercise that right of his own volition. The Court cannot prevent it, nor is the right dependent upon any judicial discretion."

Per Justice Miller in *United States* vs. *Adams*, 6 Wall, 107.

In a case in which an appeal was taken orally in open court, and no entry appeared upon the minutes, Chief Justice Taney says :

"In making the appeal the party exercised a legal right. It was made in open court, and the Clerk had official knowledge of the fact."

Speaking of the order subsequently made by the Judge, directing the entry to be made in the Order Book, he says :

"But the appellant had legal rights, and he cannot be deprived of them by any irregularity in a clerical entry. Strictly speaking, nothing ought to have been entered either in the minutes or on the Order Book as of the day the decree was passed, except the appeal itself. And this, indeed, would appear to have been all the Judge ordered. For the appeal could not have been allowed on that day, *because an order of a Court or a Judge allowing an appeal is in effect nothing more than an order to send the transcript of the record to the Appellate Court.* It is the Clerk's authority for making the return to the Superior Court And that order could not be legally given until the security required by law was offered and approved. But, when the appeal was taken, the approval of the Court could not be made the only condition upon which it should be allowed. He had a right by law to carry up his appeal, if the security he offered was approved by the Judge, out of court, in vacation; and no entry of the Clerk, and indeed no order of the Court, could deprive him of this right."

Hudgins vs. *Kemp*, 18 How., 530, 537–8.

An allowance of appeal by the Circuit Judge is not an adjudication as to whether the appeal will lie or not.

"A contrary doctrine would be exceedingly inconvenient if it could be maintained, and *would throw upon a single Judge the responsibility which properly belongs to the Court.* And it does not by any means follow that the Judge who authorizes the appeal has made up his own mind that the party is legally entitled to it. He may, and no doubt often does, entertain doubts upon the subject, or may regard the point as new and undecided, and upon which different opinions may be entertained, and in such case he grants the appeal in order to bring the matter before the Court and enable it to decide for itself whether the case is or is not within their appellate jurisdiction as regulated by the Act of Congress."

Chief Justice Taney, in

Callan vs. *May*, 2 Black, 541.

II.

The Circuit Judge, in the case at bar, in his opinion refusing the appeal, says:

"It is doubtful whether an order in an equity cause, authorizing a Receiver to borrow money for the preservation of the property in dispute and to issue debentures therefor, secured by lien on the income and *corpus* of the property, is a final decree within the well-settled rule declared in *Bostwick* vs. *Brinkerhoff*, (106 U. S., 3). I take it the rule is the same after as before final decree in the main cause."

Bostwick vs. *Brinkerhoff* was a motion to dismiss a writ of error to the Court of Appeals of the State of New York. The Chief Justice says:

"The rule is well settled and of long standing that a judgment or decree, to be final within the meaning of that term, as used in the acts of Congress, giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the cause, so that if there should be an affirmance here, the Court below will have nothing to do but to execute the judgment or decree it had already rendered" (citing cases). "It is not always easy to decide when decrees in equity are final within this rule, and there may be some apparent conflict in the cases on that subject; but in the common law courts the question has never been a difficult one."

The Chief Justice then goes on to say *that the common law case before him* was a judgment of reversal, with leave for further proceedings in the Court below, and could not, therefore, be brought to the Supreme Court on writ of error.

This certainly does not hold, or tend to hold, that a decree in an equity cause, authorizing a receiver, not only to borrow money, *but to issue certificates for that money which shall be a lien prior to the mortgage debt*, is not appealable. On the contrary let us see whether such a decree is not clearly a final decree within the rule declared in *Bostwick* vs. *Brinkerhoff*. The litigation was as to whether there should or should not

be such a preferred lien created. It is terminated in the most practical way by this decree, and if the decree is affirmed when heard on appeal, the Court below will have nothing to do but to carry it out and issue the certificates.

III.

But the Court, in its return to the order to show cause herein, makes an entirely novel suggestion which does not appear in the opinion rendered when the appeal was denied. It is to the effect that the appeal is premature, the trustee having complete remedy by opposition to the final decree of distribution of proceeds of the property, in case such decree should contain a provision applying a part of the proceeds of sale, or a part of the property in the hands of the Court to the payment of the certificates when issued in the hands of the holders thereof (Return, p. 5).

If this is so, it is certainly most unfortunate for all concerned. It is of the greatest importance to those purchasing such certificates that the position taken by parties interested on the question of their validity should be known as soon as possible. It is of no less importance to the Court that its securities should not rest under a cloud. Is it supposed that the trustee can wait for years, not signifying its opposition to these certificates,—an objection going to their very life,—until two years after the formal accounting which follows a sale of a railroad, the certificates having meanwhile passed into the hands of parties having no intimation of opposition, and then be heard to question the validity of these evidences of the Court's indebtedness in the administration of the property?

Let us see what the practical operation of such a rule would be. The decree of May 26, 1888, is made authorizing the issuing of $120,000 of certificates. The trustee takes no appeal, being entitled to none. The certificates are issued and passed into the hands

of innocent holders for value. After the expiration of two or three years, the appeal in this Court having been heard and disposed of, the railroad property is sold by the Master Commissioners appointed in the decree in the main cause. That decree provides that payment shall be made to the Master Commissioners (Return, p. 16). The sum of $25,000 is to be first paid, and the remainder upon delivery of the title, when the purchaser is to pay in cash "sufficient to pay off and satisfy all the indebtedness of the Receivers incurred by them in this cause," the amount to be ascertained by reference to a special master, and the purchaser is to make other cash payments, and may pay in bonds the proportion for which such bonds would be entitled to credit in the distribution. It is manifest that these outstanding certificates which the Receiver has sold at par, would be paid off without question. No Court would stay such payment. Suppose, after all this, the order confirming the report of the Commissioners is filed, can it be contended that then, for the first time, the trustee would have the right to appeal? Certificates not only issued, but actually paid off, and money distributed, of what practical value would the right of appeal then be? What we must do is to *stop the issue* of the certificates in the first place.

IV.

Decrees, such as that objected to, have repeatedly been the subject of appeal to this Court.

In *Williams* vs. *Morgan* (111 U. S., 684), a decree of the Circuit Court fixing compensation of mortgage trustees was held to be a final decree, as to which the Supreme Court had jurisdiction on appeal. Justice Bradley in that case says:

"That the order is such as could be appealed from we think is equally apparent. It was final in its nature, and was made *in a matter distinct from the general subject of the litigation, a matter by itself*, which affected

only the parties to the particular controversy and those whom they represented."

Blossom vs. *Milwaukee R. R. Co.* (1 Wall., 655) was a case in which a decree had been rendered foreclosing the mortgage and ordering a sale, and on the sale under the decree Blossom bid for the property. The sale was suspended at that point and never actually proceeded further. Blossom, however, went to the District Court and by petition, prayed to have the sale completed and confirmed. His application was, however, refused, and from the order of refusal he took an appeal, which, on motion to dismiss, was sustained by the Supreme Court, Mr. Justice Miller giving the opinion, from which we extract as follows:

"Although this Court has frequently decided that where the act complained of was a mere ministerial duty necessarily growing out of the decree which was being carried into effect, no appeal would lie, it has never decreed that in *no* case arising after a decree which is final only in the sense which would allow it to be appealed, will an appeal be allowed from an order of the Court, however it might affect the important interests or decide matters not before the Court when the first decree was rendered. Such a doctrine would place a very large proportion of the most important matters adjudged by Courts of Chancery beyond the reach of an appeal. On the contrary, this Court has repeatedly considered appeals from the decrees of the Circuit Courts, upon matters arising *after the case had been here*, and the Courts below had entered decrees in accordance with the directions of this Court. At the present term, in the case of A. R. Orchard *vs.* John Hughes, the Court refused to dismiss an appeal from an order confirming a sale under a decree of foreclosure, and directed that the case should be heard, with the appeal from the principal decree in the suit which ordered the sale."

Fosdick vs. *Schall* (99 U. S. 235), was a case in which after the decree of foreclosure and sale, the Court made an order as to returning certain cars and paying certain money out of the funds arising from the sale. From this order an appeal was sustained.

So again in *Trustees* vs. *Greennough* (105 U. S., 527) it was held that an appeal lay from a decree in equity for costs when they were directed to be paid, not by a particular party, but out of the fund in the hands or under the control of the Court. The order appealed from in this case was made after the final decree in the cause.

Burnham vs. *Bowen* (111 U. S., 776), was a case in which a decree of foreclosure and sale was made in October, 1876, and four years after the decree ordering the payment to the defendant of a certain sum was made, from which the Supreme Court entertained an appeal.

Perhaps an order made pending a cause, authorizing the issuing of receiver's certificates with prior lien, may not at once be appealable, but can be reviewed only when the final decree comes up on appeal. But the case is very different when the final decree has already been entered, and the Court assumes, in the exercise of its jurisdiction, which is simply a jurisdiction to *preserve* the property, *to create a preferred debt, for the purpose of construction.* An order like that must be in its very nature subject to review, whether it is made before or after final decree, and if it is made after decree, it must necessarily be itself considered a final decree and be subject to review as such.

In *Forgay* vs. *Conrad*, (6 How., 201, 204), Chief Justice Taney, speaking of final decrees, says:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried into immediate execution, the decree must be regarded as *a final one to that extent*, and authorizes an appeal to this Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the amounts between the parties pursuant to the decree passed. This rule, of course, does not extend to

cases where money is directed to be paid into Court, or property to be delivered to a receiver, or property to be held in trust to be delivered to a new trustee appointed by the Court, or cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or deterioration, and to keep within the control of the Court *until the rights of the* parties concerned can be adjudicated by a final decree."

"In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case *and every matter* in controversy in it decided in a single appeal. Cases, indeed, sometimes arise where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into Court. *But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.*"

This case of *Forgay* vs. *Conrad*, was expressly affirmed in *Thompson* vs. *Deane* (7 Wall., 342.)

In *Stovall* vs. *Banks* (10 Wall., 586), Mr. Justice Strong says:

"It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree, conclusive upon the parties."

In this case the decree complained of takes from us just so much of the security for our debt, and it is admitted that the security is entirely inadequate. Therefore this decree takes a certain sum of money which is due from the defendant to us, and is therefore an appealable decree.

In the case of the *Wabash and Erie Canal Co.* vs. *Beers*, (1 Black., 54), Chief Justice Taney held a decree final because, as he said, it left no question of right between the parties open to future adjudication. So in our case,

there is no question as to the lien of these certificates left open to future adjudication by this decree.

V.

Of course, it is not contended that every order or decree which a Court may make after the entry of the final decree in the cause, adjudicating the rights between the parties, is subject to review as a final decree. Orders of Court after judgment for carrying the judgment into effect are not appealable.

Callam vs. *May* (2 Black, 541).

It is evident that there are two kinds of orders or decrees that may be made after the final decree or judgment in the cause, namely, decrees for the purpose of carrying out the judgment, and other decrees, such as that under consideration, which effect substantial rights, and which the Court assumes to make by reason of its power, to preserve the property.

VI.

The Circuit Judge seems to have misapprehended our position with respect to the bond, for he says that the bond offered was a nominal one. We presented no bond to him for approval, but waited until he should fix the amount, expressing, however, our readiness to furnish such bond as he might require. In our petition of appeal we stated that we desired to appeal from the whole of the decree, the appeal to operate as a *supersedeas*, and prayed that he would grant the petition and order the appeal, returnable to the Supreme Court, to operate as a *supersedeas*, on the petitioner giving a bond, to be approved by the Court *in such sum as the Court might fix.*

It is true, that in presenting this petition to the Judge, which was done by letter, we stated to him that we thought that the bond on *supersedeas* should be a

small one; but, so far as the record shows, we simply asked the Judge to carry out what we conceived to be his duty, in naming the amount in which we had to give a bond, if we desired it to act as a *supersedeas*, and the amount in case we did not desire it to act as a *supersedeas*.

Second.

THE DECREE FROM WHICH WE APPEAL IS NOT ONE WHICH LIES WITHIN THE DISCRETIONARY POWERS OF THE CIRCUIT COURT AND WHICH THEREFORE CANNOT BE REVIEWED ON APPEAL.

I.

It is contended that the decree is a mere "administrative order," and therefore discretionary, and not subject to appeal.

We cannot understand the grounds on which this contention is based. Surely it is not pretended that no order which a Circuit Judge makes in the administration of the property is open to review,—that he can, in the exercise of an unlimited discretion, create prior liens to any extent and for any purpose. But unless our opponents are prepared to go to this length, they cannot claim that an "administrative order" is not subject to review.

The Circuit Judge, in his opinion, alludes to the duty of the Court to preserve the property which is the subject of the litigation, and says that, from the nature of the case, the measures to be adopted to preserve property are within the sound discretion of the Court, and that an appeal will not lie to revise the action of the Court below in the matter of discretion.

We do not propose to question the power of the Court to preserve and care for the property. What

we do question is its power to practically reconstruct it and to create a preferred indebtedness for that purpose. That no Court has power to do.

The Circuit Judge also says that the effect of an appeal with *supersedeas* would be practically to deprive the Court of the power to administer and preserve the property in its custody, and the result would be the waste and deterioration of the property to a larger extent than the amount of the Receivers' certificates proposed, and possibly the forfeiture of the franchise.

We submit, with great respect, that the questions as to what the effect and practical result of an appeal may be, are not pertinent on a motion to fix security on an appeal. The question is whether we are entitled to appeal or not, as matter of right, and if the appeal that we are entitled to shall work the ruin of the property which is mortgaged for so much more than it is worth, that is our loss. If the allowance of an appeal depended on the discretion of the Circuit Judge after considering the damage which it would do, no appeal would ever have been granted from the decree of foreclosure and sale in this case. But unfortunately the Court had no power to prevent that appeal, and therefore we are deprived of our property, and a large section of Texas is deprived of the railroad facilities which the bondholders are prepared to furnish.

II.

The action of the Circuit Court is not discretionary in any such sense as not to be open to review.

The discretion which is not subject to appeal is confined almost entirely to matters of practice.

Phillips' U. S. Supreme Court Practice, chap. VII., p. 837.

The cases to which the Circuit Judge refers in 1 Kinney's Digest, p. 79, No. 36, as sustaining his claim,

are the following: *Murphy* vs. *Stewart* (2 How., 263), a case of amendment of the record; Morsell *vs.* Hall (13 How., 212), a motion to enter an *exoneratur* of bail; *Turner* vs. *Yates* (16 How., 14), affirming the duty of the Court below to guard against surprise; *Pomeroy* vs. *Indiana State Bank* (1 Wall., 592), holding that a motion for a new trial is addressed to the discretion of the Circuit Court, and that the decision of that Court in granting or refusing it, is not a proper subject of a bill of exceptions; *Freeborn* vs. *Smith* (2 Wall., 160), holding that this Court will not hear, on writ of error, matters which are properly the subject of application for a new trial, and *Erskine* vs. *Hohnbach* (14 Wall., 613), purely a question of practice.

III.

The Circuit Judge says in his opinion that the Receivership being with the consent of petitioner, it ought not now to object to the discretion exercised by the Court for the preservation of the property.

The property was placed in the hands of Receivers on the application of the Morgan Company. Possibly the trustee may be considered as having by its position subsequently taken in the cause, assented to the receivership. Nevertheless, that implies no assent further than that the Recievers shall keep the property. We have never consented that they should reconstruct it, and we do not propose to give any such consent. Indeed, we have shown, and propose still to show our dissent by every means in our power.

The decree in question undertakes to create a preferred debt and to postpone our lien to the lien of that debt. If the Court can do this to the amount of $120,000, it can do it to the amount of millions and wipe out our entire security, giving us no right of appeal.

Third.

A WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY WHEN THE CIRCUIT COURT REFUSES TO ALLOW AN APPEAL.

If a party has done all that the statute requires to entitle him to appeal, and the allowance thereof is refused, a mandamus lies to compel the allowance.

United States vs. *Gomez*, 3 Wall., 752.

In *Ex parte Jordan* (94 U. S., 248), an application was made for mandamus to the Circuit Court of the United States for the Southern District of New York, to compel the allowance of an appeal from its decision. The Circuit Judge had refused to allow the appeal. The Chief Justice, in commenting upon section 692 of the Revised Statutes, relative to allowance of appeal, said:

"The language of the statute is 'shall be allowed,' which means 'must be allowed,' when asked for by one who stands in such relation to the case that he can demand it. The question upon such an application is, not what will be gained by an appeal, but whether the party asking it can appeal at all. * * * When this reference was made the petitioners were defendants and actors in respect to the litigation. They certainly had the right to contend before the Master and to except to his report. This they did and their exceptions were overruled. * * * A writ of mandamus will be issued directing the Circuit Court to allow the appeal asked for."

Ex parte Railroad Company (95 U. S., 221) is another case in which was decided that a party adversely affected by a final decree has a right to appeal to this Court which, if withheld, may be enforced by mandamus.

The writ of *supersedeas* is an important one, and whenever a party complies with all the requisitions of the statute in relation thereto, but the stay of execution is still denied to him, he may obtain relief from

the Supreme Court, either by mandamus or writ of *supersedeas.*

Ex parte Milwaukee R. R. Co., 5 Wall., 575.

A *supersedeas* being a statutory remedy, can only be obtained by a strict compliance with all the required conditions, none of which can be dispensed with (see *Hogan* vs. *Ross*, 11 How., 297.) Time is an essential element in the proceeding, and it is true that if a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his decree discharged from this means of staying proceedings for its enforcement; but it has been distinctly held that a *nunc pro tunc* order will be effectual for such purpose, where it appears that the delay was the act of the Court, and not of the parties, and that injustice will not be done.

Sage vs. *Railroad Co.*, 93 U. S., 412.

The Circuit Judge made the order in New Orleans. The petitioner is a New York corporation. We acted very rapidly, applying for an allowance of the appeal about two weeks after the decree was rendered. The application was considered, and denied after argument. We could do nothing more, except make application to the Circuit Court Justice, which was done as speedily as possible, for there can be no appeal without the taking of security either for costs, or costs and damages, and this is to be done by the Court or a judge or justice, by the acceptance of the security.

Sage vs. *Railroad Co.*, 96 U. S., 714.

That is the position in which we have stood ever since. We cannot take our appeal, because we cannot get a judge to fix the amount of security. We made the application within the sixty days, and consequently, under the decision above noted, if we are granted the relief now sought in the appellate court, it is clear that a *nunc pro tunc* order can and should be made, for

the reason that the delay was the act of the Court, and not that of the petitioner.

Fourth.

THE BONDHOLDERS HAVE ABSOLUTELY NO PROTECTION WHATEVER EXCEPT BY APPEAL IN THIS CASE.

The Circuit Judge, in his opinion, says that the Trustee is fully protected against all burdens placed upon the property to its damage after final decree and upon an appeal, by the appeal bond given by the appellants, on appeal from the main cause; and he quotes the case of *Kountze* vs. *Omaha Hotel Company* (107 U. S., 378). That is a case in which the Court expressly holds that in a foreclosure suit the appeal bond is *not* intended as security for either the amount of the decree or the interest accruing pending the appeal, *but for such damages as may arise from the delay incident to the appeal* (p. 390). Furthermore, the appellants can exercise their right to have the appeal dismissed, notwithstanding any opposition that we might make.

Cleveland vs. *Chamberlain*, 1 Black, 419.
Ladham vs. *Deming*, 9 Wall., 145.

To recapitulate, we insist that we have an absolute right to an appeal, the office of the Judge being simply to fix the amount of the appeal bond; that the decree in question is in no respect discretionary, but affects a most substantial right and is open to review, as it postpones the lien of our mortgage to the lien of securities to be issued by the Receivers to our great detriment; that such an order is a final decree within the meaning of the statute, and

that we have no protection except that afforded us by an appeal from the decree.

The Circuit Court does not hold the key to the gates of this Court. Saving exceptional cases which prove the rule and which are created by statute, it belongs to the appellate court to determine its own jurisdiction and to say who are and who are not entitled to appeal. Otherwise this Court would practically be at the mercy of the Circuit Court. The object of applying to the Circuit Judge for allowance of appeal is not to open discussion as to the merits of the decree, but simply that the Judge, in addition to fixing the amount of the bond, may, in the discharge of a ministerial duty, authenticate the proceedings as to their regularity and authenticity and as to the identity of the parties.

THE WRIT OF MANDAMUS SHOULD BE GRANTED.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 4, Original.

EX PARTE: IN THE MATTER OF THE FARMERS LOAN AND TRUST COMPANY, PETITIONER.

RETURN TO RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE.

J. HUBLEY ASHTON,
of Counsel for Respondents.

FILED NOVEMBER 26, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 26, 1888.

1 *Return of the Circuit Court of the United States for the Fifth Circuit and Northern District of Texas, Sitting at Waco, to the Rule Herein Issued to Show Cause Why a Mandamus Should not Issue in the Premises.*

Supreme Court of the United States. October Term, 1888.

IN THE MATTER OF THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE TEXAS CENTRAL RAILWAY CO. *et als.*
} No. 4. Original.

Ex Parte: THE FARMERS' LOAN & TRUST COMPANY, Petitioner.

To the honorable the judges of the Supreme Court of the United States:

Now comes the circuit court of the United States for the fifth circuit and northern district of Texas, by Don A. Pardee, circuit judge, and, showing cause why a writ of mandamus should not issue commanding this court to allow the appeal asked for by the Farmers' Loan & Trust Company from the order, signed on the 26th day of May, 1888, authorizing the receivers of the Texas Central
2 Railway Company to borrow the sum of one hundred and twenty thousand ($120,000) dollars and issue receivers' certificates therefor, avers and says—

I.

That this litigation was commenced in the month of April, 1885, by bill in equity filed by Morgan's Louisana and Texas Railroad and Steamship Company against The Texas Central Railway Company, claiming a lien upon all the property of said Texas Central Railway Company paramount to the lien of the mortgage creditors, averring the insolvency of said corporation, and seeking the appointment of receivers to control and manage the property during the pendency of the suit. After due hearing, Benjamin G. Clarke and Charles Dillingham were appointed receivers, and a copy of the order so appointing them is hereto annexed and made part of this return as Exhibit A. The ability and integrity of these receivers has never been questioned, and they have remained in possession and control of defendant's property from the date of their appointment to this time.

The trustees of the various mortgages were by supplemental bill made parties defendant in the cause. The Farmers' Loan & Trust Company was the trustee for certain first mortgages upon the lines owned by the Texas Central Railway Company. They appeared and filed an answer to the bill of the Morgan Company, and at a subsequent date they filed a cross-bill seeking to foreclose the
3 mortgages which it represented as trustee, alleging in said cross-bill that the mortgagor company was insolvent; that its

indebtedness, bonded or otherwise, was so large that the company and its receivers were utterly unable to pay the floating debt and discharge the interest on the mortgage bonds from time to time out of the earnings; that this state of affairs was liable to continue for an indefinite period of time; that in consequence of the embarrassed condition of the financial affairs of the mortgagor company it was impossible for the trustee under the mortgage deeds of trust to execute said trust in the manner therein specified without the aid or interposition of the court, nor could the trust be executed and the rights of the parties in interest be ascertained and fully protected otherwise than by judicial sale of the mortgaged premises and property covered by the mortgage deed of trust.

This cross-bill also alleged that until such sale could be made and the proceeds thereof be distributed your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises, and appurtenances so mortgaged to your orator in trust as aforesaid, and all the rights, franchises, and property of said Texas Central Railway Company of whatsoever name, nature, and description, including all its moneys on hand and the earnings of the same, continue to remain and be placed in the hands and under the control of a receiver or receivers, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred. This cause proceeded in
4 due course upon bill and cross-bill until the 11th day of April, 1887, when a final decree was entered in the cause, whereby it was adjudged, among other things, that the complainant, Morgan's Louisiana and Texas Railroad and Steamship Company, have an equitable lien upon the property of the Texas Central Railway Company to secure its claim for something over $750,000, with interest, but that said lien is subordinate to those which the Farmers' Loan & Trust Company has under the mortgage deeds of trust to the amount of something over four millions of dollars, with interest. A copy of this decree is hereto annexed and made part of this return, as document B. In default of the payment of the amounts decreed within a time fixed the equity of redemption of the railway company and of all the parties to the suit in and to the mortgaged property was barred and foreclosed and the property ordered to be sold to the highest bidder for cash. The complainant, Morgan's Louisiana and Texas Railroad and Steamship Company, and the defendant, The Texas Central Railway Company, respectively, asked and were allowed appeals to the Supreme Court of the United States from the whole of said decree, the same to operate as a supersedeas, on their giving bond in the sum of $300,000 each. The required bonds, conditioned in due form of law, were executed and approved, and these appeals are now pending in this honorable court under the numbers 631 and 633 of the October term, 1888, to the records whereof respondent craves leave at all times to refer, and
5 from which records all the allegations aforesaid will more fully and at length appear.

II.

On February 15th, 1888, the receivers, who had necessarily remained in possession of the property pending the appeals aforesaid, presented to the court a petition, a copy of which is annexed to this return and made part hereof as Exhibit "C." The said petition set forth the condition of the property in their charge, averred that the replacing of certain new ties in the track was absolutely necessary to enable them safely and properly to manage and operate the road, and that the failure to place such new ties in the track would be a violation of their duty to the public and patrons of the road while engaged in the business of common carriers, as well as of the duty they owe to the court, as its officers, to preserve the property of the company; and further averred the destruction of certain necessary bridges by rains, and the absolute necessity of replacing the temporary structures, which were constantly liable to be washed away, with new iron structures, and asking leave of the court to borrow the sum of $120,000 for the purpose of making these absolutely necessary repairs.

This petition was referred to the master with instructions to hear the same forthwith, after notice to the parties in interest, and to file his report on the same as soon as possible after said hearing.

To this petition the Farmers' Loan & Trust Company filed
6 an answer, a copy of which is annexed to and made part of this return and marked Exhibit D.

After hearing the parties the master filed the report which is hereto annexed and made part of this return as Exhibit E. This report substantially confirms the averments of the receivers' petition. It finds that the condition of the track of the Texas Central Railway Company, owing to rotten and defective cross-ties, is unsafe for traffic and passenger travel; that the necessity for the repair of this track was urged during the years 1886 and 1887 upon the receivers by the superintendent of the railway; that the condition of said track has been growing worse, and that a reasonable precaution for the safety of passengers and the safe transportation of freight and a proper care for the rolling stock of the defendant railway company demands that the evil be remedied as far as practicable. It further finds the substantial facts with reference to the destruction of bridges, the temporary structures in their stead, and their liability to be washed away and destroyed; and further finds that the income from the property since the possession of the receivers has been barely sufficient to meet operating expenses, and that the receivers have no money or funds with which to make the repairs referred to in the petition. He therefore recommends that the prayer of the receivers be granted; that they be authorized to borrow so much of $120,000 as may be necessary to procure cross-ties, replace and repair bridges and piers, and to widen embankments where necessary to protect the ties, and that they be authorized to issue receivers' certifi-
7 cates therefor, to operate as a lien upon said railway second only to the twenty-five thousand dollars of receivers' certificates then outstanding, said certificates to be made payable on or before the expiration of two years from their date.

To this report the Farmers' Loan & Trust Company appeared and filed the exceptions, a copy of which is annexed to and made part of this return as Exhibit F.

Thereupon the cause came on to be heard, by consent of parties, on the 26th day of May, 1888, on the above exceptions to the report of the special master, and the court granted the order complained of in this cause, of which a copy is annexed to and made part of this petition, marked Exhibit G.

III.

Within the legal delays after the entering of said order the Farmers' Loan & Trust Company presented a petition for an allowance of appeal from said order of the 26th of May, 1888, said appeal to operate as a supersedeas, returnable to the Supreme Court of the United States at its October term, 1888. A copy of this petition of appeal is found in Exhibit A, annexed to the petition herein of the Farmers' Loan and Trust Company. After due consideration this application for appeal was denied by the court, acting through the circuit judge, on June 12th, 1888, for the reasons set forth in the opinion then given, a copy of which is hereto annexed and made a part
8 hereof, marked Exhibit H. The matter of the appeal was further heard before the Honorable L. Q. C. Lamar, circuit justice, at Oxford, Mississippi, who, in August, 1888, after advisement upon the application, concurred in the opinion of the circuit judge.

Owing to this attempt to appeal from the order aforesaid and owing further to notification given the receivers of intention on the part of the Farmers' Loan & Trust Company to apply to the Supreme Court of the United States for a writ of mandamus to compel the allowance of an appeal for said order, the receivers have not executed the said order and await the judgment of the Supreme Court upon this mandamus proceeding.

IV.

That as to the matters and things averred in paragraph 8 of the petition herein filed for a writ of mandamus respondent has no knowledge whether or not the same be true, but respondent submits to the court that no contest was made, either before the master or before the court, by petitioner as to the fact of the deplorable condition in which the property in the custody of the court was and as to the necessity of making repairs upon it according to the suggestion of the receivers; that upon the trial of the application of the receivers for the issuance of receivers' certificates before the master a copy of the report of one Deming, employed by the bondholders to examine the road and make a report to them of its condition, was offered in evidence by the receivers and was returned
9 into court by the master as a part of the testimony taken by him on the hearing, a copy of which said report is annexed to and made part hereof, marked Exhibit I.

The position of the Farmers' Loan & Trust Co., as appears by the pleadings, presented only the naked question of the power of the court to preserve the property, pending the appeal herein, in its custody for the benefit of whom it might concern. The judges of this court concluded that it was their right and duty to preserve the property, necessarily in the possession of the court during the appeal, from destruction and deterioration, to keep it a going concern, and to preserve its franchises from forfeiture, and they are of opinion that the measures adopted by them to that end are necessarily discretionary.

The judges were further of opinion that the order issued on the application of the receivers, granting them permission to borrow money and to issue receivers' certificates therefor, was an interlocutory order, from which the Farmers' Loan & Trust Company was not entitled to appeal and against the effects of which said company had complete remedy by opposition to the final decree of distribution of the proceeds of the property in case said decree should contain a provision applying a part of the proceeds of sale or a part of the revenue of the property in the hands of the court to the payment of the certificates, when issued, in the hands of the holders thereof.

Respondent, having made full return, respectfully submits the whole matter to the honorable Supreme Court, and will ever pray, &c.

DON A. PARDEE,
Circuit Judge, Fifth Circuit.

10 EXHIBIT A.

Order Appointing Receivers.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Waco.

MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY
vs.
THE TEXAS CENTRAL RAILWAY COMPANY. } No. 21., Ch. D.

Before the Hon. Don A. Pardee, United States circuit judge for the said circuit, sitting at chambers, in the city of New Orleans, La.

This cause came on to be heard this day, in chambers, upon the application of the complainant for the appointment of a receiver, and was argued by counsel, Messrs. Farrar & Kruttschnitt for the complainant, and Messrs. Baker, Botts & Baker for the defendant; and the court being sufficiently advised, upon the motion of the complainant for the appointment of a receiver, this day submitted to the court upon the bill, exhibits, and affidavits filed by the complainant—

It is ordered, adjudged, and decreed by the court that Benjamin

G. Clarke, of New York, and Charles Dillingham, of New Or-
11 leans, La., upon their giving bond in the sum of one hundred thousand dollars, be appointed joint receivers herein to take possession of the money and assets, real and personal, road-bed, road, iron, ties, lands, rights of way, rolling stock, leases, franchises, and all other rights of property whatsoever of the said Texas Central Railway Company, wherever the same may be found, with power to manage, control, and exercise all the franchises whatsoever of the said railway company, and with power to prosecute, defend, and continue all suits brought by said company or against the said company, whether heretofore or hereafter commenced, or whether in the name of the said railway company or otherwise; to defend all suits brought against them as such joint receivers or affecting their joint receivership, and to bring such suits in the name of the said company as they may be advised by counsel to be necessary and proper in the discharge of the duties of their office, and for acquiring, securing, and protecting the assets, franchises, property, and rights of the said railway company.

And it is further ordered, adjudged, and decreed that the said defendant, The Texas Central Railway Company, transfer and deliver over to the said joint receivers, on oath, under the direction of the special master hereinafter appointed, all of the property, real and personal, wheresoever found, and all other equitable interests and things in action and other effects which belong to or were held in trust for the said defendant railway company or in which it had any beneficial interest, in the same condition that they were in at the time of exhibiting the said bill of complaint in this case, except as far as necessarily changed in the proper management of the said railway or in which it now has any such interest, and that the said defendants deliver over in like manner all books, vouchers, or other effects relating thereto.

12 And it is further ordered that the said joint receivers have full power and authority to inquire after, receive, and take possession of all such property, equitable interests, and things in action and other effects, and for that purpose to examine the said defendant, its officers, and such other persons as they may deem proper on oath before the said master from time to time as they may deem necessary.

And it is further ordered that the said Benjamin G. Clarke and Charles Dillingham, joint receivers, are hereby directed and required as such receivers to keep a full and accurate account of all their acts and doings as such receivers, and to report the same to this court from time to time as they may be hereafter directed by order of this honorable court, and in the meantime and until another order of this court be rendered to run, operate, and manage the railways of the said defendant railway company, and to manage and control all of the said property and affairs of the said defendant railway company; and the said joint receivers are hereby empowered and directed to employ such counsel and attorneys as they may deem necessary to manage in their behalf such suits and

other affairs as have arisen or may arise, and to advise the said receivers in relation to the performance of their duties therein.

And it is further ordered, adjudged, and decreed that the said receivers may use the moneys of the said defendant railway company for any and all of the purposes stated in the foregoing provisions.

And it is further ordered, adjudged, and decreed that John G. Winter, Esq., attorney-at-law, of Waco, Texas, be appointed special master in chancery herein, and that he be clothed with all the powers of a master in chancery of this court as to all matters herein referred to him or that may hereafter be referred to him.

13 It is further ordered, adjudged, and decreed that any of the parties to this bill may, if they so desire, have leave to apply to the special master above named to have the bond of the joint receivers hereinabove fixed increased, or diminished according as they may be advised.

Thus done and signed, in the city of New Orleans, La., at chambers, this 4th day of April, A. D. 1885.

DON A. PARDEE, *Judge.*

Endorsed, to wit: "No. 21. U. S. circuit court, northern district of Texas. Morgan's Louisiana & Texas Railroad and Steamship Company *vs.* Texas Central Railway Company. Order appointing receivers. Filed April 6, 1885. J. H. Finks, clerk."

A true copy.
Attest:

____ ____,
Clerk U. S. Circuit Court, N. D. of Texas, at Waco.

14 EXHIBIT B.

At a stated term of the circuit court of the United States for the northern district of Texas, held at the court-rooms, in the city of Waco, on the eleventh day of April, 1887.

Present: The Honorable Don A. Pardee, circuit judge.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY
vs.
THE TEXAS CENTRAL RAILWAY COMPANY, THE Farmers' Loan and Trust Company, as Trustee, and The Metropolitan Trust Company of the City of New York, as Trustee. } Original Bill.

In Equity. No. 21.

THE FARMERS' LOAN AND TRUST COMPANY, as Trustee,
vs.
THE TEXAS CENTRAL RAILWAY COMPANY, THE Metropolitan Trust Company of the City of New York, and Morgan's Louisiana and Texas Railroad and Steamship Company. } Cross-Bill. No. 33.

15 This cause came on to be heard at this term and was

argued by counsel; and thereupon, upon due consideration thereof, it was ordered, adjudged, and decreed as follows, namely:

I. The court finds from the pleadings, exhibits, and evidence that the cross-complainant herein, The Farmers' Loan and Trust Company, is and for more than twenty years last past has been a corporation duly organized and existing under the laws of the State of New York, having its principal office for the transaction of business in the city of New York, in said State of New York; that the defendant, The Texas Central Railway Company, is a corporation duly organized and existing under the laws of the State of Texas, with power to construct and operate lines of railway in said State, having its principal office for the transaction of business at Ross, in said State of Texas; that the defendant, The Metropolitan Trust Company of the City of New York, is a corporation duly organized and existing under the laws of the State of New York, having its principal office for the transaction of business in the city of New York, in said State of New York, and that the original complainant and cross-defendant, Morgan's Louisiana and Texas Railroad and Steamship Company, is a corporation duly organized and existing under the laws of the State of Louisiana, having its principal office for the transaction of business in the city of New Orleans, in said State of Louisiana.

II. The court further finds that on or about September 15th, 1879, the defendant, The Texas Central Railway Company, executed and delivered to the complainant, The Farmers' Loan and Trust Company, its certain first mortgage or deed of trust, dated that day, wherein and whereby the said railway company, in order to secure the payment of a series of one-thousand-dollar bonds to be
16 issued at the rate of fifteen thousand dollars for each mile of road, all to bear said date, did grant and convey unto the cross-complainant, its successors and assigns, all and singular the main line of the said Texas Central Railway Company's railway, built and to be built, beginning at the Ross station, in McLennan county, Texas, extending through the counties of McLennan, Hill, Bosque, Hamilton, Erath, and Comanche, to or near the centre of Eastland county, a distance of about one hundred and thirty miles, together with all side tracks, turnouts, rolling stock, equipments, and materials, all rights of way and tracks, depot and shop grounds, tenements, hereditaments, rights, and franchises, including and meaning to include all the property, real and personal, then acquired or which thereafter might be acquired by the said company in the State of Texas used for and pertaining to the operation of the said railway; which said conveyance of mortgage was made in trust on certain terms and conditions for the benefit of the owners and holders of the said bonds and of the interest coupons thereto annexed.

III. The court further finds that in the said mortgage or deed of trust it was, among other things, provided that in case the Texas Central Railway Company should fail to pay any of the interest on any of the said bonds at any time when the same might become due and payable and such default should continue sixty days

after demand, then and thereupon the principal of all the said bonds should be and become immediately due and payable.

IV. The court further finds that the said mortgage or deed of trust was and is the proper act and deed of the defendant, The Texas Central Railway Company, by it authorized, made, and delivered in all respects in conformity to law, and that the same was duly recorded in the offices of the clerks of the several coun-
17 ties wherein said railroad and other property affected thereby was situated on or about October 7th, 1879, so as to be and constitute a first lien upon the mortgaged premises and property therein mentioned and described; that the same was also registered, in all respects according to law, so as affect the chattels and other personal property of the said railway company in each and every one of said counties, the original or a certified copy thereof remaining in each case on deposit.

V. The court further finds that the bonds to secure which said mortgage or deed of trust was made were all dated September 15th, 1879, and were made for the sum of one thousand dollars each, payable to bearer November 1st, 1909 (and they are herein designated for convenience as the bonds of 1909), with interest at seven per centum per annum, payable semi-annually on the first days of May and November in each year on the presentation and surrender of the proper annexed coupons, both principal and interest being payable in gold coin of the United States, and they were each identified by a certificate thereon made by the trustee to the effect that the bond so certified was one of the series described in and secured by the said mortgage or deed of trust. Two thousand one hundred and forty-five of said bonds, aggregating two million one hundred and forty-five thousand dollars of principal, have been issued and are outstanding as valid obligations of the said defendant, The Texas Central Railway Company, and entitled to the benefit of the security of said mortgage or deed of trust.

VI. The court further finds that after making the said deed of trust the charter of the defendant, The Texas Central Railroad Company, was amended, and that thereupon, on or about May 16th, 1881, the defendant, The Texas Central Railway Company, executed and delivered to the cross-complainant, The Farmers' Loan
18 and Trust Company, a certain other deed of trust, dated that day, wherein and whereby, for the purpose of meeting the expense of constructing, completing, and putting into operation the extension of its railway and its branch line authorized to be constructed by the amendment to its charter, and for the purpose of exchanging and redeeming the series of bonds above described to the amount of two million one hundred and forty-five thousand dollars, secured by the first above-mentioned deed of trust, said railway company, in order to secure the payment of a certain other series of one-thousand-dollar bonds to be issued for the purposes aforesaid at the rate of fifteen thousand dollars for each mile of road, all to bear said last-mentioned date, did grant and convey unto the cross-complainant, its successors and assigns, all and singular the main line of the said Texas Central Railway Company's railway

then built and to be built, beginning at the town of Ross, in McLennan county, extending through the counties of McLennan, Hill, Bosque, Hamilton, Erath, Comanche, Eastland, Callahan, Shackleford, Stephens, Throckmorton, Haskell, Knox, Bayler, Kings, Hardeman, Cottle, Motley, Childress, Hall, Collingsworth, Donley, Armstrong, Gray, Carson, Roberts, Hutchinson, Moore, Hansford, and Sherman, to a point on the north boundary line of the State of Texas between the 101st and 102nd meridian of west longitude, a distance of about 375 miles; and also all and singular the said Texas Central Railway Company's branch line, built or to be built, beginning at Whitney, in Hill county, and thence through the counties of Hill, Johnson, Ellis, Dallas, Kaufman, Rockwall, Van Zandt, Hunt, Rains, Wood, Hopkins, Franklin, Titus, Red River, and Bowie, to a point on Red River, in Bowie county, east of the eastern boundary line of the Indian Territory, a distance of about two hun-
19 dred and thirty-five miles; and also all and singular the said Texas Central Railway Company's branch line of railway, built or to be built, beginning at a point in Hopkins county on the said company's branch line of railway from Whitney to Red River, in Bowie county, thence through the counties of Hopkins, Delta, and Lamar, to a point on Red River in Lamar county near the mouth of Boggy river, a distance of about sixty-five miles, together with all side tracks, turnouts, rolling stock, equipments, and materials, all rights of way and tracks, depot and shop grounds, tenements and hereditaments, rights and franchises, including and meaning to include all the property, real and personal, then acquired or which might thereafter be acquired by the said railway company in the State of Texas used for and pertaining to the operation of the said railway, as therein described; which said conveyance of mortgage was made in trust, on certain terms and conditions, for the benefit of the holders and owners of the said last-mentioned bonds and of the interest coupons thereon annexed, and which said conveyance of mortgage or deed of trust, so far as the same affected property which was already subject to the lien of the first mortgage or deed of trust, dated September 15th, 1879, and previously made to the Farmers' Loan and Trust Company, as above stated, was in all respects subsequent and subsidiary to the lien of said first mortgage or deed of trust.

VII. The court further finds that in the said last-mentioned deed of trust it was, among other things, provided that in case the Texas Central Railway Company should fail to pay any of the interest on any of the said bonds at any time when the same might become due and payable and such default should continue sixty days after demand, then and thereupon the principal of all the said bonds should be and become immediately due and payable.

20 VIII. The court further finds that the said last-mentioned mortgage or deed of trust was and is the proper act and deed of the defendant, The Texas Central Railway Company, by it authorized, made, and delivered in all respects in conformity to law, and that the same was duly recorded in the offices of the clerks of the several counties wherein said railroad and other property

affected thereby was situated on or about July 28th, 1881, so as to be and constitute a first lien upon the mortgaged premises and property therein mentioned and described, except as to that portion thereof above first described as subject to the lien of the first mortgage of September 15th, 1879, above mentioned, and as to that portion of the mortgaged premises and property it was so recorded so as to constitute a second lien on the same, subject only to the lien of the said first mortgage; that the said mortgage or deed of trust of May 16th, 1881, was also registered, in all respects according to law, so as to affect the chattels and other personal property of the said railway company in each and every one of said counties, the original or a certified copy thereof remaining in each case on deposit.

IX. The court further finds that the bonds to secure which the mortgage or deed of trust of May 16th, 1881, was made were all dated that day and were made for the sum of one thousand dollars each, payable to bearer May 1st, 1911 (and they are designated for convenience as the bonds of 1911), with interest at seven per centum per annum, payable semi-annually on the first days of May and November in each year on the presentation and surrender of the proper annexed coupons, both principal and interest being payable in gold coin of the United States, and they were each identified by a certificate thereon, made by the trustee, to the effect that
21 the bond so certified was one of the series described in and secured by the said mortgage or deed of trust of May 16th, 1881. Under the said last-mentioned mortgage or deed of trust one thousand two hundred and fifty-four of said bonds, aggregating one million two hundred and fifty-four thousand dollars, have been issued and are outstanding as valid obligations of the said defendant, The Texas Central Railway Company, and entitled to the benefit of the security of the said mortgage or deed of trust of May 16th, 1881.

X. The court further finds that on or about the first day of October, 1884, the said defendant, The Texas Central Railway Company, made and delivered a certain other mortgage or deed of trust to the defendant, The Metropolitan Trust Company of the City of New York, to secure a series of bonds to be issued and to be known as general mortgage bonds of said company, and that said railway company did, by said general mortgage or deed of trust, grant and convey to the said Metropolitan Trust Company of the City of New York all the property theretofore conveyed to the Farmers' Loan and Trust Company by the mortgages or deeds of trust hereinabove set forth and either of them; but the court does hereby find and adjudge that the rights, liens, and claims of the said Metropolitan Trust Company of the City of New York and the beneficiaries under its trust, so far as the same exist, are in all respects subsequent and subsidiary and junior to the rights and equities of the cross-complainant herein, as trustee under the said mortgages or deeds of trust so made to the cross-complainant as aforsaid, and of the holders of the bonds to secure which the same were made respectively, both of the said mortgages or deeds of trust to the cross-complainant being

prior liens to the said general mortgage, the first as to the property therein described and the second as to the entire property of the
22 defendant railway company; that the general mortgage bonds provided to be issued under the said deed of trust to the Metropolitan Trust Company of the City of New York were duly executed and signed by the said defendant railway company and delivered to the said Metropolitan Trust Company for the purpose of having the said trust company certify the same as provided in the said deed of trust, but that the said Metropolitan Trust Company declined making such certification, on the ground that the mortgage had not been recorded in certain of the counties mentioned in the said act of mortgage through which the Texas Central Railway Company had a right under its charter to construct the line of railway mentioned in said mortgage, but through which no railroad had at that time or has now been constructed; that while the said mortgage was undergoing recording in the said counties aforesaid the Texas Central Railway Company, on or about the first day of November, 1884, in settlement of its indebtedness to the Houston & Texas Central Railroad Company, a corporation organized under the laws of the State of Texas, did make and execute its sixteen certain promissory notes, fifteen thereof for the sum of fifty thousand dollars each and one thereof for the sum of eleven thousand nine hundred and ninety-two dollars and four cents, and for the security of each of the said fifty-thousand-dollar notes the said Texas Central Railway Company did pledge to the said Houston & Texas Central Railway Company one hundred and fifty of its said general mortgage bonds, and for the security of its said note of eleven thousand nine hundred and ninety-two dollars and four cents the said Texas Central Railway Company did so pledge thirty-six of its said general mortgage bonds, thus making a pledge of a total amount of general mortgage bonds of two million two hundred and eighty-six
23 thousand dollars, being the total amount of said general mortgage bonds which the said Texas Central Railway Company was authorized to issue for the length of the road already built by it; that all of the said notes were dated November first, 1884, and all due on demand; that due demand has been made for the payment of said notes on the Texas Central Railway Company, which has failed to pay the same; that in order to make a pledge of said bonds, which were not yet countersigned and certified by the trustee, the said Texas Central railway did issue and deliver to the said Houston & Texas Central Railway Company its certificates or obligations in lieu of said bonds, obligating itself to deliver said bonds, as soon as executed and signed by said trustee, to said Houston & Texas Central Railway Company; that said Houston & Texas Central Company did pledge said notes of said Texas Central Railway Company, together with the certificates for the bonds securing the same, to the complainant herein, Morgan's Louisiana & Texas Railroad and Steamship Company, as part security for its indebtedness due by said Houston & Texas Central Railway Company to the said complainant, and that the complainant herein, Morgan's Louisiana & Texas Railroad and Steamship Company, is the holder, as pledgee

of all of the said notes of the Texas Central Railway Company, as also certificates for the bonds securing the same, and that the complainant herein, Morgan's Louisiana & Texas Railroad and Steamship Company, has an equitable lien upon all of the property above described to the amount of $761,992.04, with six per centum per annum interest thereon from the first day of November, 1884, until paid, said lien, however, being junior and subordinate in all respects upon the property above described to the liens growing out
of the mortgages or deeds of trust as aforesaid executed to the
24 Farmers' Loan and Trust Company, cross-complainant herein, and that in case the proceeds of the sale of the said property as hereinbelow ordered to be sold shall not be sufficient to pay all liens and charges herein decreed to be prior to the lien and charges of Morgan's Louisiana & Texas Railroad and Steamship Company, and also the sum herein decreed to be paid to the said Morgan's Louisiana & Texas Railroad and Steamship Company, the said last-named company shall have execution against the said Texas Central Railway Company for all such overplus remaining unpaid as aforesaid.

XI. The court further finds that the defendant, The Texas Central Railway Company, was on May 1st, 1885, and still is insolvent and unable to meet or pay its obligations, including the coupons issued on its bonds secured by the said mortgages or deeds of trust to the Farmers' Loan and Trust Company, respectively, maturing upon that day, and that it wholly failed to pay the same, and that it made default in the payment of all the said coupons which matured May 1st, 1885, upon the bonds secured by the said mortgages or deeds of trust or either of them, and that it has not paid any of the said coupons maturing on either of said mortgages or deeds of trust which fell due November 1st, 1885, nor those which fell due May 1st, 1886, nor any coupon which matured since that day, but that all the said coupon interest remains in default and overdue and unpaid; and, further, that payment of said interest has been duly demanded, and that such default has continued sixty days after such demand, and that therefore the principal of all the said bonds secured by the said deeds of trust and each and all of them (including both the bonds of 1909 and the bonds of 1911) is and has become immediately due and payable.

XII. The court further finds that the principal and interest overdue and unpaid upon the bonds secured by the said deeds of trust amounts as follows, namely:

25 First. As to the mortgage dated September 15th, 1879, that the principal sum of all the bonds of 1909 is two million one hundred and forty-five thousand dollars; that on the first day of May, 1885, and again on the first day of November, 1885, and again on the first day of May, 1886, and again on the first day of November, 1886, there matured and fell due coupons representing interest on the said bonds amounting on each of said days to the sum of seventy-five thousand and seventy-five dollars, so that the amount of said coupon interest in the aggregate amounts to the sum of three hundred thousand and three hundred dollars, and that interest is

due upon said coupons from the time when they respectively matured to the date of this decree, amounting to the sum of twenty-one thousand five hundred and twenty-one $\frac{52}{100}$ dollars, and that interest is also due on the principal sum of said bonds from November 1st, 1886, when the last coupon matured, amounting to sixty-six thousand seven hundred and thirty-three and $\frac{33}{100}$ dollars, so that the entire amount of principal and interest due on said bonds of 1909 to the date of this decree is the sum of two million five hundred and thirty-three thousand five hundred and fifty-four and $\frac{85}{100}$ dollars, all of which is payable in lawful gold coin of the United States.

Second. As to the deed of trust dated May 16th, 1881, that the principal sum of all the bonds of 1911 is one million two hundred and fifty-four thousand dollars; that on the first day of May, 1885, and again on the first day of November, 1885, and again on the first day of May, 1886, and again on the first day of November, 1886, there matured and fell due coupons representing interest on said bonds amounting on each of said days to the sum of forty-three thousand eight hundred and ninety dollars, so that the amount
26 of said coupon interest in the aggregate amounts to the sum of one hundred and seventy-five thousand five hundred and sixty dollars, and that interest is due upon said coupons from the time when they respectively matured to the date of this decree, amounting to the sum of thirteen thousand four hundred and $\frac{81}{100}$ dollars, and that interest is also due on the principal sum of said bonds from November 1st, 1886, when the last coupon matured, amounting to thirty-nine thousand and thirteen and $\frac{33}{100}$ dollars, so that the entire amount of principal and interest due on said bonds of 1911 to the date of this decree is the sum of one million four hundred and eighty-one thousand nine hundred and seventy-four and $\frac{13}{100}$ dollars, all of which is payable in lawful gold coin of the United States.

XIII. The court further finds that, by reason of the default of the said Texas Central Railway Company to pay the said coupon interest due as aforesaid and any of it, and by reason of other matters and things hereinabove alleged, the conditions of the said mortgages and deeds of trust of September 15th, 1879, and May 16th, 1881, and of each of them made by the Texas Central Railway Company to the Farmers' Loan and Trust Company have been broken, and that the said mortgages and deeds of trust and both of them have become absolute, and that the trustee is entitled to a decree for the sale of all the said mortgaged property to satisfy the principal and interest of the said bonds secured by the said mortgages or deeds of trust, respectively, and all of them.

XIV. And the court finds that the claim of the complainant, Morgan's Louisiana & Texas Railroad and Steamship Company, is in all respects subsequent and subsidiary and junior to the lien of the mortgages or deeds of trust made to the Farmers' Loan and Trust Company as aforesaid and each of them upon the property
27 described in the foregoing deeds of trust to said Farmers' Loan and Trust Company.

XV. The court doth therefore order, adjudge, and decree that the

principal sums specified in the said bonds secured by the mortgages or deeds of trust made to the Farmers' Loan and Trust Company, bearing date September 15th, 1879, and May 16th, 1881, respectively, and hereinabove described and each and all of said sums have now become due and payable in accordance with the terms of the said instruments and of the said mortgages or deeds of trust so made to said trustee as aforesaid.

XVI. And the court doth further order, adjudge, and decree that the said defendant, The Texas Central Railway Company, shall, within ten days from the date of this decree, pay into this court for the use and benefit of the holders of the bonds and unpaid coupons secured by the said mortgages or deeds of trust to the Farmers' Loan and Trust Company the sum of four million and fifteen thousand five hundred and twenty-eight and $\frac{98}{100}$ dollars in gold coin of the United States, with interest thereon from the date of this decree at the rate of eight per cent. per annum, and also a sufficient sum of money to defray the costs of this cause, to be taxed.

XVII. The court doth further order, adjudge, and decree that in default of the payment of the sums so above ordered to be paid by the said defendant or by some other person on its behalf, then all the equity of redemption of the said defendant, The Texas Central Railway Company, and of all the parties to this suit, and of all the holders of bonds or other claims issued under and secured by the mortgage made to the Metropolitan Trust Company of the City of New York of, in, or to the said mortgaged premises, property, assets, rights, and franchises and every part and parcel thereof
28 described in the said mortgages or deeds of trust to the cross-complainant, The Farmers' Loan and Trust Company, or either of them, including all property embraced within the terms of the said mortgage of May 16th, 1881, and not included within the terms of the mortgage of September 15th, 1879, shall be barred and foreclosed, and that in default of such payment all the said mortgaged premises and property, real, personal, or mixed, rights, and franchises shall be sold to the highest bidder for cash, without appraisement or redemption, at public auction at twelve o'clock, noon, at the door of the court-house of the county of McLennan, in the city of Waco, in the State of Texas, at a day to be named by the commissioners herein appointed in their advertisement of sale, and previous notice of the time and place of such sale shall be given by publication once a week for the period of eight successive weeks prior to the time of such sale in two newspapers, one published in the city of Waco, in the State of Texas, and the other in the city of New York, in the State of New York. The commissioners or either of them may adjourn the sale from day to day or week to week without further advertisement, but only on request of the cross-complainant or its solicitors or by the order of the court or a judge thereof.

XVIII. And it is further ordered, adjudged, and decreed that the railroad property and premises as described in the said mortgages to the Farmers' Loan and Trust Company shall be sold as one parcel and as an entirety, the court hereby finding such mode of sale

to be for the best interests of all concerned, and upon the following terms and conditions, to wit:

First. Sale shall be for cash, and the purchaser at the sale shall then and there pay over to the master commissioners the sum of twenty-five thousand dollars in cash and the remainder of said bid upon confirmation of the sale and delivery of title, as hereinafter provided.

29 Second. Upon confirmation of the sale and delivery of title the purchaser shall pay in cash such sums as may be ascertained, on due reference to and report by the master, sufficient to pay off and satisfy all the indebtedness of the receivers incurred by them in this cause, including all the expenses and costs of the receivers' administration of the property, all claims and demands adjudged against them growing out of their operation of the property, all receivers' certificates heretofore ordered to be issued and remaining unpaid, all indebtedness for pay-rolls, materials, and supplies due by the said receivers, and also the compensation of the receivers and their solicitors; and if any claim remains unsettled or unascertained at the date of the confirmation of the sale and delivery of title to the purchaser which should be or may afterwards be adjudged to be a claim against the said receivers, and the cash paid in shall not be sufficient to pay off the same, the said claim or claims so adjudged shall be, and are hereby, decreed to be a first and prior lien on the said railway in the hands of the purchaser, and may be so enforced by the order of this court, and no claim shall be filed against the said receivers growing out of their administration of the property unless the same shall be filed within sixty days from the date of the order confirming the sale herein directed to be made; and the special master in chancery, John G. Winter, heretofore appointed in this case, is hereby directed to examine and report to this court, on or before the date fixed for the sale of the property herein, after due and proper notice to the parties concerned, what amounts are to be paid for all of the purposes mentioned in this subdivision.

Third. The purchaser shall also pay in cash the costs of this suit, to be taxed, and also the compensation of the cross-complain-

30 ant herein for its services, charges, and expenses in the execution of its trusts respecting the two mortgages made to it, including its own compensation and its disbursements and allowances for solicitors' and counsel fees in the execution of its trusts respecting such mortgages, and for services in this cause, and for all proper expenses attendant upon the sale of the property subject to the said mortgages, including the commissions and compensation of the commissioners making such sale, all which charges and expenses shall be hereafter fixed and allowed by the court or a judge thereof, and as to all matters mentioned in this subdivision, except the compensation of the special master commissioners, reference is hereby made to John G. Winter, special master in chancery, with directions to examine and report to the court the proper amounts to ble fixed and allowed for the same, and also any other allowances proper to be made to solicitors and counsel in this cause.

Fourth. After fully paying off all the claims entitled to be the first paid out of the proceeds of the sale in cash, above set forth in subdivisions 1st, 2nd, and 3rd of this section, the remainder of said bid may be paid either in cash or in bonds or overdue coupons belonging thereto, secured by the said mortgages or either of them, made to the Farmers' Loan and Trust Company, as aforesaid, the said bonds and coupons to be received at such price or value as will be equivalent to the distributive amount that the holders thereof would be entitled to receive in case the entire amount of the bid were paid in cash; and whereas $2,145,000.00 of first-mortgage bonds were issued upon and hold a first lien on one hundred and forty-three miles of said railway and property, and $1,254,000.00 of bonds were issued upon and hold a first lien on eighty-three miles of said railway and property, it is therefore ordered and directed that the remainder of the said cash bid, after the aforesaid
31 payments entitled to be first paid, be divided into two parcels in the proportion and on the basis of the mileage of the road sold. The total line of road sold being two hundred and twenty-six miles, said liens on first-mortgage bonds, to wit, the bonds of 1909 being the first lien on the 143 miles of said road, as aforesaid, and the bonds of 1911 being a first lien upon the 83 miles of said road, as aforesaid, therefore the remainder of the said bid shall be divided so as to set off $\frac{14\frac{1}{2}}{226}$ of said amount to be distributed among the bonds of 1909, and $\frac{83}{226}$ of said bid to be distributed among the bonds of 1911.

Fifth. And in case the amount of said bid shall be more than sufficient to pay the sum and amounts set forth in subdivisions 1st, 2nd, 3rd, and 4th above of this section the amount of such overplus shall be applied to the payment of the sum herein decreed to be due to the complainant, Morgan's Louisiana & Texas Railroad and Steamship Company.

XIX. And it is further ordered, adjudged, and decreed that if the proceeds of the sale of the property above directed to be made shall not be sufficient to satisfy the sum herein adjudged in favor of the Farmers' Loan and Trust Company, trustee, and in favor of Morgan's Louisiana & Texas Railroad and Steamship Company, the said complainant, Morgan's Louisiana & Texas Railroad and Steamship Company, and the said cross-complainant, The Farmers' Loan and Trust Company, are hereby declared to have a personal judgment and decree against the said Texas Central Railway Company for the balance that will remain due to them, respectively, over and above the proceeds of the said sale, and shall have execution in due form of law for the balance due them, respectively, and leave is hereby given to the said complainant and cross-complainant to levy the said executions upon the property of the defendant now in the hands of the receivers, if any, not subject to the
32 mortgages above mentioned, and to sell the same in due form of law, and to apply the proceeds of the same to the satisfaction of the said balance due them, respectively.

XX. It is further ordered that Charles Dillingham and John G. Winter be, and they are hereby, appointed special master commis-

sioners for the purpose of making the sale hereby decreed, and to execute and deliver a deed of conveyance of the property so to be sold to the purchaser or purchasers thereof on the order of the court or a judge thereof in case of such sale.

The court reserves, however, the right, in term time or at chambers, to appoint another special master commissioner with like powers in case of the death, disability, or declination to serve of either of the special master commissioners hereby designated.

The sale so to be made by said master commissioners shall be forthwith reported by them to the court, and the same shall stand confirmed, unless within ten days from the filing of said report some party entitled so to do shall file exceptions to said sale, and in case of the filing of any such exceptions the same shall immediately stand for hearing before the court or a judge thereof.

XXI. And it is further ordered, adjudged, and decreed that the purchaser or purchasers of the property herein and hereby ordered to be sold shall be invested with and shall hold, possess, and enjoy the said mortgaged premises and property and all the rights, privileges, and franchises appurtenant thereto as fully and completely as the said Texas Central Railway Company, defendant herein, now holds or enjoys or at the time of the commencement of this suit held and enjoyed or is or was entitled to hold or enjoy the same;

33 and, further, that the purchaser or purchasers shall have and be entitled to hold said railroad and property free and discharged from the claims of all parties to this suit, including the original complainant and all interveners herein.

XXII. It is further ordered, adjudged, and decreed that any party to this cause or the receivers or master commissioners herein appointed may apply to the court for such orders necessary for the carrying of this decree into execution as equity and the nature of the matter may require.

In open court, April 12th, 1887.

DON A. PARDEE,
Circuit Judge.

34 Endorsed as follows, to wit: Morgan's Louisiana and Texas Railroad and Steamship Company *vs.* The Texas Central Railway Company, The Farmers' Loan and Trust Company, as trustee, and The Metropolitan Trust Company of the City of New York, as trustee. Original bill. In equity. No 21. The Farmers' Loan and Trust Company, as trustee, *vs.* The Texas Central Railway Company, The Metropolitan Trust Company of the City of New York, and Morgan's Louisiana and Texas Railroad and Steamship Company. Cross-bill. No. 33. Final decree. Filed April 12, 1887. J. H. Finks, clerk.

A true copy.
Attest: —— —, 188–.

—— ——, *Clerk.*

35 EXHIBIT C.

Petition of Receivers as to Issuance of Receivers' Certificates.

In the Circuit Court of the United States for the Northern District of Texas, at Waco.

MORGAN'S LOUISIANA & TEXAS RAILWAY AND STEAMSHIP COMPANY
vs.
TEXAS CENTRAL RAILWAY COMPANY *et al.*
} Eq. No. 21.

To the honorable judges of said court:

The petition of Charles Dillingham and Benjamin G. Clarke, who are the receivers appointed by this honorable court in the above-entitled cause, respectfully represents—

That in April, 1885, the date when petitioners came into possession of the property of defendant railway company, it was discovered that the roadway of said company was in bad condition and greatly in need of repairs; that most of the ties then in the track were in a rotten condition and unsafe for use; that nearly all of said ties were made of either cypress or pine, and had been in use in said track for six (6) years, the usual length of time a tie is allowed to
36 remain in use; that in the latter part of the year 1885 the operating department in charge of said track made to your petitioners a full statement of the condition of the track, showing the necessity of retieing a portion of the same. It was then estimated that it was necessary to place in the track during the year 1886 sixty-five thousand (65,000) new ties in order to place the same in good and safe condition for the running of trains. Your petitioners, recognizing the fact that owing to the failure of the crops during that year but a small revenue comparatively was derived from the operation of the road, felt it to be their duty to make no greater expenditure than was absolutely necessary to enable the trains to run with reasonable safety. They placed in the track during the year 1886 less than one-half of the number of ties demanded by the operating and maintenance departments.

At the close of the year 1886 the operating department again called to the attention of your petitioners the condition of the roadway and the necessity of placing new ties in the track, and showed that, notwithstanding the renewals made in that year, the track was in worse condition than it was in the beginning of the year, and again made requisition for a larger number of ties than had been made in January, 1886.

Having experienced another disastrous crop year, owing to the long-continued droughts, which were the occasion of calamities that have become a part of the history of the State, and knowing that in order to purchase the necessary ties it would be necessary to borrow money on receivers' certificates, which they wished to avoid in view of the then anticipated decree of foreclosure and sale of the property

in their charge, they again postponed presenting the matter to the court for its advice in the premises.

37 Your petitioners further represent that, recognizing the present legal status of this cause, they have had made a thorough and careful inspection of the roadway by the several officers of your petitioners, who are in charge of the operating department, whose duty it is to look to the maintenance of the track and the running of trains. The reports made by said officers are that it is absolutely necessary a large number of new ties should be placed in the roadway in order to enable petitioners safely to operate the said railway and perform the duty incumbent by law upon them as the representatives of the defendant railway company in the conduct of the business of a common carrier.

Your petitioners believe and so represent that the interests of all concerned would be subserved by placing in said track 120,000 new ties, which, it is estimated, will cost the sum of $60,000; that the replacing of the said number of ties is absolutely necessary to enable petitioners safely and properly to manage and operate the road, and that the failure to place said new ties in the track would be a violation of their duty to the public and patrons of the road while engaged in the business of a common carrier as well as the duty they owe to the court as its officers to preserve the franchises of the company.

Your petitioners further represent—

That in the latter part of August, in the year 1887, there fell a heavy rain along a portion of the line of said railway, which caused the waters of Steele creek and Duffen river to rise; that the increased flow of water in said streams was so great as to wash away four of the iron bridges crossing said streams in use by said railway, and also the piers supporting the superstructure of said bridges, as well as the trestle-work and earth-work used as approaches to said bridges; that two of said bridges were entirely washed away and ren-

38 dered unfit for further use. The other two were swung from their original position and, though now secured, have never been replaced for the want of funds to do the necessary work. Not having the necessary means to replace said bridges, piers, and approaches, your petitioners put in temporary wooden bridges to enable them to run trains; that said bridges and work, though reasonably safe for present use, are of a temporary character and liable to be washed away at an ordinary rise of the streams before mentioned, which may occur at any time after the usual rains that are incident to certain seasons of the year in that section of the country through which said railway runs; that in the event said temporary work is washed away the replacing of same would be very expensive and, besides, would occasion heavy pecuniary loss in the suspension of the transportation business of said railway.

That petitioners have had an estimate made of the cost of the necessary material and work to be done in rebuilding and replacing said bridges, piers, and approaches; that the aggregate amount, as shown by said estimates, is the sum of sixty thousand ($60,000) dol-

lars, which your petitioners believe and so aver is as low in amount as will enable them properly to conduct and perform said work.

Your petitioners further aver that they have no funds in hand with which they can purchase new ties and replace said bridges. They therefore submit the matter to the court for its advice in the premises, and ask for an order authorizing petitioners to borrow the sum of one hundred and twenty thousand dollars for the purposes aforesaid, and, as security for the same, to issue and negotiate receivers' certificates in manner and form as heretofore authorized by order of this honorable court.

FARRAR & KRUTTSCHNITT, *Solicitors.*

39 *Order.*

The above petition is referred to Jno. G. Winter, special master in chancery, with instructions to hear the same forthwith, after notice to the parties in interest, and to make and file his report on the same as soon as possible after such hearing; and said report shall stand for hearing after five days from filing thereof, within which time the parties may have leave to file oppositions and exceptions.

February 15th, 1888.

DON A. PARDEE, *Judge.*

Endorsement: "No. 21. In equity. U. S. circuit court for northern district of Texas, at Waco. Morgan's Louisiana & Texas Railway and Steamship Company *vs.* The Texas Central Railway. Petition of receivers as — issuance of receivers' certificates. Filed February 18, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Farrar & Kruttschnitt, solicitors."

A true copy of the original on file in my office.
Attest: —— —, 1888.

J. H. FINKS, *Clerk,*
By —— ——, *Deputy.*

40 EXHIBIT D.

Original Answer of Farmers' Loan & Trust Company to Petition of Receivers to Borrow $120,000.

In the Circuit Court of the United States for the Northern District of Texas, at Waco. In Chancery.

MORGAN'S LOUISIANA & TEXAS RAILWAY AND STEAMSHIP COMPANY *vs.* TEXAS CENTRAL RAILWAY COMPANY *et al.* } No. 21.

The Farmers' Loan and Trust Company, for answer to the petition of Charles Dillingham and Benjamin G. Clarke, receivers herein, filed February 18, 1888, respectfully shows to the court as follows:

I.

This respondent, being so advised, denies the right of the court to grant the prayer of the petition and authorize the petitioners to borrow any such sum as $120,000 for the purposes set forth in said petition, issuing as security therefor receivers' certificates, to be a lien on the railroad property prior to the lien of the mortgages foreclosed in this cause and the decree of this court foreclosing
41 the same; and this respondent, reserving all its rights in this particular, says that issuing certificates to any such amount and for the purposes set forth in the petition would amount to such betterment and reconstruction of the road as to go far beyond the power and authority of the court.

II.

This respondent further says that, as mortgagee in trust under the mortgages and trust deeds made by the Texas Central Railway Company and complainant in the cross-bill filed herein, it makes this its formal objection on the record to the issuing of any certificates or evidences of indebtedness of any kind or description by the receivers herein, and to the creation of any preferred indebtedness purporting to have a lien on the mortgaged property or any part thereof superior to the lien of the said mortgages and of the decree rendered under said cross-bill.

III.

This respondent further says that, appeals having been taken to the Supreme Court of the United States by Morgan's Louisiana and Texas Railroad and Steamship Company and by the Texas Central Railway Company from the decree rendered in this cause, this respondent has filed a motion in the Supreme Court of the United States that said Court will advance such appeals upon its docket and hear them at an early date, and that if such petition is granted a speedy sale can be had of the mortgaged property and premises, and it will in such case be unnecessary to consider the allegations made by the receivers in their said petition.

Wherefore this respondent prays that the court will stay the consideration of the said petition until the decision of said motion
42 by the Supreme Court of the United States, and that if this petition is pressed by the receivers and comes on for hearing that the prayer thereof be denied.

[SEAL.] THE FARMERS' LOAN AND TRUST COMPANY,
By R. G. RALSTON, *President.*

Attest: WM. A. LEUPP, *Sec'y.*

TURNER, McCLURE & RALSTON, *Solicitors.*

Endorsement: "No. 21. United States circuit court, northern district of Texas. Morgan's Louisiana and Texas Railroad and Steamship Company *vs.* The Texas Central Railway Company *et al.* Orig-

inal answer of the Farmers' Loan and Trust Company to petition of receivers, filed February 18, 1888. Turner, McClure & Rolston, solicitors for Farmers' Loan and Trust Company, 20 Nassau street, New York. Filed March 12, 1888. John G. Winter, master. Filed March 21, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

A true copy.
Attest: —— —, 1888.

J. H. FINKS, *Clerk*,
By —— ——, *Deputy*.

43 EXHIBIT E.

Report of Special Master upon Petition of Receivers for Authority to Issue Certificates, &c. Filed February, 1888.

In the Circuit Court of the United States for the Northern District of Texas, at Waco. In Chancery.

MORGAN'S LOUISIANA & TEXAS RAILWAY AND STEAMSHIP COMPANY
vs.
TEXAS CENTRAL RAILWAY COMPANY *et al.*
} No. 21.

To the honorable the judges of said court:

The petition of the receivers in this cause for authority to borrow one hundred and twenty thousand dollars and to issue certificates therefor, &c., referred to the special master, under order of court of February 15th, 1888, was called for consideration at my office, in Houston, on the — day of February last, and, by agreement of counsel, the hearing was adjourned to the 12th day of March, on which date, at my office, in Houston, the hearing was concluded—Mr. Farrar and Mr. Mott, counsel as of record, being in attendance. Messrs. Baker, Botts & Baker entered their appearance for the defendant railway company. I herewith file the answer of the Farmers'
44 Loan and Trust Company to said petition, filed before me March 12th; also report of oral testimony adduced on hearing, together with memorandum of estimate by A. H. Swanson and D. Allen, and motion by the said trust company to advance cause in Supreme Court U. S., containing report of Chas. C. Deming relative to the physical condition of the Texas Central railway. Except as developed in cross-examination, no testimony was adduced other than that offered by the petitioners. Only so much of the answer of the trust company as relates to the postponement of the consideration of the petition was urged before the master, and as to that I ruled that under the terms of the order of reference the master was without discretion, and, counsel announcing ready as to the facts, I directed that the hearing proceed. I find from the evidence that the condition of the track of the Texas Central railway, owing to rotten and defective cross-ties, is unsafe for traffic and passenger travel; that throughout the distance of one hundred and seventy-six miles, between Ross and Albany, the termini of the northwestern branch

of said railway, and fifty-two miles constituting the northeastern division, the cross-ties placed in the road-bed during the period of construction, during the years 1879–1882, are still in use, with the exception of a limited number put in in "driblets," from time to time, to meet immediate demands, to prevent the spreading of the rails, &c.; that all of the ties now in use are more or less decayed, some being broken in four pieces, with ends elevated between the rails; that about one-fourth of the ties, between five and six hundred to the mile, are now so rotted that they will not hold the spikes in fastening the rails, and that it will require at least five hundred ties to the mile of road, about one hundred and four thousand, at a cost of fifty cents each, to put the track in reasonably safe condition
45 for the operation of trains. I find that the necessity for these repairs was, during 1886 and 1887, urged upon the receivers herein by the superintendent of said railway; that during the period named the conditions have been growing worse, and that a reasonable precaution for the safety of passengers, the safe transportation of freight, and a proper care of the rolling stock of the defendant railway company demands that the evils be remedied as far as practicable.

I find that a portion of that section of country through which the railway is built was visited in the fall of 1887 by a high freshet which carried away three iron bridges; that the bridges have been replaced with temporary trestles, which, in the absence of freshets in the streams over which they are constructed, are for the present safe, but that in the event of high water in the late spring, which is the season in which freshets in such streams usually occur, such structures would probably be washed away; that one of said bridges can be repaired, while two of them will have to be replaced, and that the estimated cost of doing this work and re-erecting the bridges upon safe and permanent stone piers is thirty-three thousand dollars.

I find that the iron bridge over Aquilla creek, on the northwest branch of said railway, is erected upon wooden piers; that the bridge is in peril in the event of rains during the spring season that will raise the waters in said creek to a freshet point; that during the present month of March high water in said creek caused the bridge to settle down 8 or 10 inches, necessitating the temporary suspension of trains and the transfer of passengers, and that the safety of the bridge is imperiled with every rise of moment in the waters of the creek, and that to make the bridge safe against such incidents
46 it is necessary that the present piers be replaced with stone, the cost of which is estimated at eight thousand dollars.

I find that the iron bridge across the Trinity river, on the northeast division of said railway, is built similarly to that across the Aquilla, above referred to; that this bridge is likewise in danger of loss with the Trinity in a swollen condition, and that it has "slipped" on two or three occasions, and that stone piers of the estimated cost of eight thousand dollars are necessary to render it safe against high waters. The structures across East Bosque, Middle, and West Bosque, Green creek, and Leon river, referred to in the esti-

mate of Mr. Swanson herewith filed, do not appear to require such attention as those hereinbefore referred to, as they have never been disturbed. The estimate calls for twenty-five thousand dollars for expenditure upon these streams, but appears not to be embraced in the work to accomplish which the receivers ask the aid of the court.

In the estimates made at the hearing before the master is an item of six thousand dollars for repairs to a bridge near Morgan, but the evidence does not disclose the condition of that structure nor to what extent it has been impaired.

In enumerating the foregoing items of ties and bridges, other than those relative to the three Bosques, Green creek, Leon river, and the bridge near Morgan the estimates are—

For cross-ties	$57,000 00
Bridges, etc.	49,000 00
	$106,000 00

This does not embrace the item relative to the bridge near Morgan, $6,000, which was embraced in the estimate made on hearing, nor does it embrace an item of $8,000 for widening em-
47 bankments, which is referred to in Mr. Deming's report in evidence, p. 18, as "not excessive." The necessity for the last two items, $14,000, is not so fully established as the other items, nor can I report so definite a finding as to them other than as appears from the testimony of the general transportation manager, Mr. Swanson, that the amount named in the receivers' petition, $120,000, in which is included the above aggregate of $106,000, is necessary to put the roadway in a reasonably safe condition.

I find that there are now outstanding $25,000 of receivers' certificates issued under order of court for the payment of debts due by the railway company at the time that the receivers went into the possession of the railway; that the income from the property since the possession of the receivers has been barely sufficient to meet operating expenses, and that the receivers have no funds with which to make the repairs referred to in their petition.

I find that the early summer months offered the best opportunity for continuous and economical work upon the railway track, and that the greatest demand upon the capacity of said railway for transportation commences about the 1st of September, when the cotton crop begins to be marketed, but that the indications now are that there will be unusual increase in traffic at an earlier date in the transportation of cattle and of what now promises to be a heavy grain crop.

It appears from the evidence that there have been several derailments of, but no serious accidents to, trains over said road within the past two years; that the trains are operated upon a schedule of thirteen miles per hour, with actual running time of about sixteen miles; but it also appears that the continuance of such good fortune in the present condition of the track, bridges, &c., is eminently speculative and uncertain.

48 The premises considered, I am of the opinion, and so respectfully recommend, that, unless it appears in the course of this litigation that the receivers in this cause will cease at an early day to have the custody, management, and operation of said railway, *that* the prayer of their petition should be granted, and that they be authorized to borrow so much of $120,000 as may be necessary to procure cross-ties, replace and repair bridges and piers, and widen embankments where necessary to protect the ties, &c., and that they be authorized to issue certificates therefor as a lien upon the said railway, second only to the $25,000 of certificates now outstanding, such certificates to be made payable on or before the expiration of two years from their date.

Respectfully submitted.

JOHN G. WINTER,
Special Master.

Endorsement: "No. 21. In equity. M. L. & T. R. R. & S. S. Co. *vs.* Tex. Cent. R'y Co. *et al.* Report of special master on petition of receivers to issue $120,000 debentures. Filed March 21, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy."

A true copy.
Attest: —— —, 1888.

J. H. FINKS, *Clerk*,
By —— ——, *Deputy*.

49 EXHIBIT F.

Exceptions to Report of Special Master. Filed March 21, 1888.

Circuit Court of the United States, Northern District of Texas. In Chancery.

MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY
vs.
TEXAS CENTRAL RAILWAY COMPANY *et al.* } No. 21.

THE FARMERS' LOAN AND TRUST COMPANY, Cross-Complainant,
vs.
THE TEXAS CENTRAL RAILWAY COMPANY *et al.*, Cross-Defendants.

The *defendant*, The Farmers' Loan and Trust Company, make these its exceptions to the report of the special master filed herein March 21, 1888, upon the petition of the receivers for authority to issue certificates, etc.:

I. For that the master has reported that only so much of
50 the answer of the trust company as relates to the postponement of the consideration of the petition was urged before him, whereas the facts are that the answer was filed with the master, and that the entire answer was entitled to consideration by

the master, particularly as it raised questions of right and power on the part of the court.

II. For that the master has recommended that unless it appears in the course of this litigation that the receivers in this cause will cease at an early date to have the custody, management, and operation of the railway that the prayer of their petition should be granted and they be authorized to borrow so much of $120,000 as may be necessary to procure cross-ties, replace and repair bridges and piers, and widen embankments where necessary to protect the ties, etc., and that they be authorized to issue certificates therefor as a lien upon the said railway.

III. For that the master has recommended that certificates, if issued, be made payable on or before the expiration of two years from their date, whereas, if issued at all, they should be made payable on or before the expiration of three years from their date.

IV. For that the master has not reported that the court has no right to grant the prayer of the petition and to authorize the petitioners to borrow any such sum as $120,000 for the purposes set forth in the petition, issuing as security therefor receivers' certificates to be a lien on the railroad prior to the lien of the mortgages foreclosed in this cause and the decree of this court foreclosing the same.

V. For that the master has not found that in view of the fact that the respondent has filed a motion in the Supreme Court of the United States that said Court will advance the appeals from the decree entered in this cause upon its docket and hear such appeals at an early date, and the fact that if such petition is granted
51 a speedy sale will be had of the mortgaged property and premises, and that it will in such case be unnecessary to consider the allegations made by the receivers in their said petition; therefore it is premature to consider the petition.

VI. For that the master has not found that the prayer of the petition should be denied.

Respectfully submitted.

TURNER, McCLURE & RALSTON,
Solicitors for Complainant.

Endorsement: "United States circuit court, northern district of Texas. Morgan's Louisiana and Texas Railroad and Steamship Company *vs.* The Texas Central Railway Company *et al.* The Farmers' Loan and Trust Company, cross-complainant, *vs.* The Texas Central Railway Company *et al.*, cross-defendants. Exceptions to report of special master. Filed March 21, 1888. Turner, McClure & Ralston, solicitors for cross-complainant, 20 Nassau St., New York. Filed April 11, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy."

A true copy.
Attest: —— —, 1888.

J. H. FINKS, *Clerk*,
By —— ——, *Deputy*.

52 EXHIBIT G.

An Order in Reference to the Issuance of $120,000 *Receivers' Certificates.*

In the United States Circuit Court for the Northern District of Texas, at Waco.

MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP COMPANY *vs.* THE TEXAS CENTRAL RAILWAY COMPANY *et al.* — No. 21, Equity Docket.

This cause came on to be heard by consent of parties on the 26th day of May, 1888, before the Hon. Don A. Pardee, circuit judge, sitting in chambers, at the city of New Orleans, on the exceptions of the Farmers' Loan and Trust Company to the report of the special master herein filed March 21st, 1888, on the petition of the receivers to borrow one hundred and twenty thousand dollars herein filed on February 15th, 1888, and was argued by counsel; whereupon and on consideration thereof—

It is ordered, adjudged, and decreed that the exceptions of
53 the said Farmers' Loan and Trust Company to the said master's report be overruled, and that the said master's report be confirmed; and

It is further ordered, adjudged, and decreed that the joint receivers herein, Benjamin G. Clarke and Charles Dillingham, be authorized to borrow the sum of $120,000, for which sum they are authorized and empowered to issue certificates or debentures not to exceed $120,000 in amount, and each of said debentures or certificates to be for such amount as said receivers may deem proper, to bear a rate of interest not exceeding six per cent. per annum, to fall due, at the option of the receivers, on or before the expiration of two years from their date, and said receivers are authorized to sell said certificates at not less than par, the proceeds thereof to be applied to the purpose of the necessary repairs and reconstructions recommended in the report of the master.

It is further ordered that said certificates and obligations, when issued, shall become, and they are hereby declared to be, a lien upon the road-bed, rolling stock, depots, and all other property of said railway company, including the net earnings thereof after deducting expenses of this receivership and the operation of the road, said lien to be prior to all other liens except the lien for $25,000 of receivers' certificates heretofore allowed, to be issued under orders of this court.

It is further ordered that said certificates or debentures be substantially in the form following, to wit:

"Office receivers Texas Central Railway Company, Benjamin G. Clarke and Charles Dillingham, joint receivers. Ross, Texas, ——, ——, 188–. Two years after date, or on or before the expiration of two years, at the option of the receivers, for value received, we, Benjamin G. Clarke and Charles Dillingham, as joint receivers of the

54 property of the Texas Central Railway Company, do, under and by virtue of the power in us vested by an order of the circuit court of the United States in and for the northern district of Texas, at Waco, made on the 28th day of May, 1888, in a certain cause wherein Morgan's Louisiana and Texas Railroad and Steamship Company is complainant and The Texas Central Railway Company *et al.* are defendants, No. 21 of the equity docket, hereby promises to pay, at the —— Bank, in the city of New York, to bearer hereof —— dollars, with interest from date until paid at the rate of — per cent. per annum.

"This obligation is one of a series, amounting to one hundred and twenty thousand ($120,000) dollars, authorized by said court to be made by us as receivers, and is, together with others of the same series, made and declared to be a lien upon the road-bed, rolling stock, depots, and all other property of the said railway company, of every nature and description, wheresoever situated, and also a lien upon the residue of the earnings, incomes, and profits of said property that there may be after deducting operating expenses, costs of repairs, and the expenses of our receivership, and said lien to be prior to all other liens except the lien of $25,000 of receivers' certificates heretofore issued under order of the said court."

DON A. PARDEE, *Judge.*

Endorsed as follows, to wit: "No. 21. U. S. circuit court, northern district of Texas. Morgan's La. and T. R. R. & S. S. Co. *vs.* Texas Central Railway Co. *et al.* Order in reference to issue of $150,000 receivers' certificates. Filed May 29, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy."

55 A true copy of the original.
Attest: ——, 1888.

J. H. FINKS, *Clerk,*
By —— ——, *Deputy.*

56 EXHIBIT H.

Opinion of Court Refusing Appeal.

The Texas Central railroad property is in the possession of the court through receivers at the instance of the complainant, Morgan's Louisiana Railroad and Steamship Company, and the consent of the cross-complainant, The Farmers' Loan and Trust Company.

It is the duty of the court appointing the receivers to see that the property is properly cared for and preserved and, if possible, managed as a "going concern."

Wallace *vs.* Loomis, 97 U. S., 146.
Barton *vs.* Barbour, 104 U. S., 134.
Miltenberger *vs.* Logansport, 106 U. S., 312.
Burnham *vs.* Bowen, 111 U. S., 781.

This duty continues after final decree and pending appeal.
Bronson *vs.* La Crosse R. R., 1 Wall., 410.

From the nature of the case "the proper and judicious measures necessary to adopt to preserve the property from waste and loss" are within the sound discretion of the court.

An appeal will not be to revise the action of the court below in a matter of discretion.

See cases cited, Kinney's Digest, Vol. 1, p. 79, No. 36.

It is doubtful whether an order in an equity cause authorizing a receiver to borrow money for the preservation of
57 the property in dispute and to issue debentures therefor secured by lien on the income and *corpus* of the property is a final decree within the well-settled rule declared in Bostwick *vs.* Brinkerhoff, 106 U. S., 3.

I take it the rule is the same after as before final decree in the main cause.

The receivership being with the consent of the Farmers' Loan and Trust Company, that company ought not to object to the discretion exercised by the court for the preservation of the property, particularly when, as in this case, said company is fully protected against all burdens placed on the property to its advantage after final decree and pending appeal by the appeal bond of $500,000 given by appellant.

Kountze *vs.* Omaha Hotel Co., 107 U. S., 378.

The effect of an appeal with supersedeas in this case will be practically to deprive the circuit court of the power to administer and preserve the property in its custody, and the result will be the waste and deterioration of the property to a larger extent than the amount of the receivers' certificates proposed, and possibly the forfeiture of the franchise from the inability to maintain the railroad as a "going concern" for the transportation of persons and property.

See master's report printed in the record.

An appeal granted on the bond offered (to wit, a nominal one) would leave no responsible party for the damages necessarily resulting to the property, whichever way the appeal might be decided.

The case is one where the jurisdiction is complete and undisputed; where the receivership is consented to by the complaining party; where the order complained of is an im-
58 perative necessity; where the action of the court is discretionary, and where the complaining party is fully protected in case the order finally results to his damage.

I am compelled to refuse the appeal; nevertheless, that the party may have an appeal if the law gives one, I will suspend execution of the order complained of until June 25th to enable the matter to be laid before the hon. circuit justice, or for the petitioner to take such other steps for relief as counsel may advise.

June 12th, 1888.

DON A. PARDEE,
Circuit Judge.

I concur in the foregoing order of the circuit judge.
Macon, Ga., Aug., 1888.

L. Q. C. LAMAR,
Circuit Justice.

59 Endorsed as follows, to wit: In the United States circuit court for the northern district of Texas, at Waco. Morgan's Louisiana & Texas Railroad & Steamship Co. *vs.* The Texas Central Railway Company, The Farmers' Loan and Trust Company, as trustee, and The Metropolitan Trust Company of the City of New York, as trustee. Original bill. In equity. No. 21. The Farmers' Loan and Trust Company, as trustee, *vs.* The Texas Central Railway Company, The Metropolitan Trust Company of the City of New York, and Morgan's Louisiana and Texas Railroad and Steamship Company. Cross-bill. No. 33. "Order of appeal from decree. Turner, McClure & Ralston, solicitors for Farmers' Loan and Trust
60 Company. Filed Sept. 1, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy."

A true copy.
Attest: —— —, 1888.

J. H. FINKS, *Clerk*,
By —— ——, *Deputy*.

61 EXHIBIT "I."

"Herbert B. Turner, Esq.

"DEAR SIR: Pursuant to your request I have made an examination of the Texas Central railroad, and report as follows:

"On the morning of December 22, 1887, I was met by Mr. Swanson, the master of transportation of the Houston and Texas Central and of the Texas Central railroad, with a special car, and started with him for Ross, the southern terminus of the Texas Central railroad. We arrived at Ross at about three o'clock in the afternoon, and examined the Texas Central road from Ross to Walnut Springs. It then became dark and we continued on to Albany, leaving there early the next morning and examining back from Albany to Walnut Springs.

"The ties on this portion of the road are of oak, cypress, and yellow pine. With the exception of about four hundred ties to the mile, the original ties put in the road still remain there, and as ties under the best condition do not last over six or seven years, it is manifest that all the ties on this portion of the road will need renewal very shortly. This road was constructed from 1879 to 1881.
Mr. Swanson's idea is to put in as renewals five hundred ties
62 to the mile, not because more ties are not needed, but because he thinks that one tie in four will sustain the track. New ties here are needed as a matter of absolute safety. The old ones are so decayed that in many instances the spikes can be taken out with the hand and there is no support to the rail. Those ties which had been taken out and were lying along the side of the track were so decayed as to be nothing more than punk, and useless even as fire-wood. As

a matter of safety to the traveling public, and to prevent serious loss to the company occasioned by accidents, which will surely occur unless the track is supported by new ties, the amount requested by Mr. Swanson should be furnished at once. More will be needed in a very short time, and within the next two years I should say that every tie would have to be renewed.

"In places along the line of this road the embankment has been allowed to fall away and for many miles is not as broad as the tie, so that the ends of the tie overlap the bank. There is an unlimited supply of ballast within easy reach, and there is no reason, except want of funds, why these banks should not be repaired. It is impossible, even with the greatest care, to keep the track in proper condition and prevent sinking if the embankment is allowed to remain in its present condition. It is the poorest kind of economy to save in the banks.

"One of the most serious difficulties in keeping this road in proper condition arises from the heavy floods, which are liable to occur once or twice a year. These floods are occasioned by cloud-bursts, and the small streams over which the road crosses rise thirty or forty feet in a few hours, carrying away bridges and sweeping the track and road-bed many hundred feet into the neighboring fields. During the last floods, in September, 1887, four bridges were carried away and about fifteen miles of track swept off the line of the road.

"All the important bridges along the line of the road are of iron, with wooden foundations. Mr. Swanson has requested authority to build these foundations of stone, and there can be no question as to its advisibility or economy. Stone is found along the line of the road and can be quarried very cheaply. With stone foundations these bridges would undoubtedly be able to withstand any flood, and would relieve the company from the necessity of con-
63 tinual repairs and from the expense occasioned by suspending traffic during the repairs to the bridges.

"At the first crossing of the creek called Steel's creek an iron bridge, 150-foot span, on wooden foundations, was carried away last September. At Aquilla creek another bridge was carried away. At the second crossing of Steel's creek an iron bridge on wooden foundations was carried away, and at the third crossing of Steel's creek the water was up to the chords, but the bridge was saved. Unless these bridges are protected by stone foundations the public is constantly subject to delays and entire stoppage of trains for many days at a time. When first-class iron bridges costing about $8,000 apiece are continually liable to destruction from want of proper support, as shown by the loss of four bridges during the fall of 1887, the economy and necessity of stone foundations cannot be questioned.

"Previous to this severe flood of September, 1887, there had been no rain in this portion of the country for twenty-two months—a period of drought that has had no counterpart in thirty years. The result was that the crops were killed, cattle died, and the inhabitants vacated their homes and went to other portions of the State. During this period trains were only run three times a week. Since September there have been frequent rains; the ground is in excellent

condition; crops of cotton, corn, and grain are looking well, and the people are commencing to return to their old homes. The day before I went over the road a special train had been used to carry returning settlers into the country adjacent to the line of road.

"Only two through trains a day, one each way, called mixed trains, carrying freight and passengers, are run on this road, the schedule time being about 14 hours from Ross to Albany, or about thirteen miles an hour, including stops. I passed both of them and noticed that two cars were comfortably filled with passengers and there seemed to be considerable freight—ten freight cars on one train and thirteen on the other. Between Ross and Cisco two freight trains, one each way, run daily.

"On the one hundred and seventy miles of road from Ross to Albany only 44,218 ties, less than 400 to the mile, have been put in since the road was first opened, and many of these, it is claimed, were to make up deficiences in original construction, so that that number of ties does not really represent the amount of renewals.

64 "In that portion of the road which was carried away old and discarded Houston and Texas Central rails have been put in in place of the rails which were destroyed. These rails are in bad condition and ought to be renewed. They were bought in the emergency and were not intended for permanent use in the track.

"Taking up Mr. Swanson's requisition in detail:

"*Widening Embankments*, $8,000.

"This amount is not excessive. What is needed is a force on a construction train adapted to the purpose, with a commissary department and conveniences for feeding and sleeping the gang. The cars could be hired from the Houston and Texas Central road. The Texas Central has no cars available for this purpose, and in fact has no construction car or caboose. Three trains of two cars each, without locomotives, belonging to the Houston and Texas Central road, are even now in constant use by the Texas Central for bridge and section gangs.

"*New Stone Piers for Four Iron Bridges*, $24,000.

"They could probably be built for $2,000 less. I have explained above the necessity for these stone piers.

"*Two New Iron Bridges*, $16,200.

"These are needed to take the place of the two carried away over Steel's creek, first and second crossing. They would cost about $16,000, depending upon the market price of iron at the time of making the contract.

"*Taking Down and Re-Erecting One One Hundred and Fifty Foot Span*, $1,200.

"The crossing at Duffan creek is badly located with reference to

the angle at which the water strikes the bridge. The cost of changing the location and at the same time raising the grade to a point of comparative safety from water would cost at least $1,200.

"*Cross-Ties*, $44,000.

"This estimate is based on five hundred new tiers per mile for one hundred and seventy-eight miles of road, at fifty cents apiece. These ties have to be transported for a long distance and cannot be delivered along the line of road for less than fifty cents.

65 "100 *Tons of Steel Rails*, $4,200.

"The one hundred tons of steel rails mentioned are to take the place of the old discarded rails purchased from the Houston and Texas Central and are necessary. They could probably be delivered, if purchased now, for about $3,600.

"The estimate for switch ties, track bolts, and spikes, bridge timbers and iron-work for trestle bridges is not excessive.

"The trestle bridge, for repairing which $1,000 is mentioned, has already been replaced from receipts since the date of the requisition.

"As to the estimates of Mr. Swanson, therefore, for improvements and renewals pertaining to the roadway and bridges, amounting to a total of $104,779, I consider that each one of the items there mentioned is necessary, with the exceptions stated, and that the amounts required are moderate. This expenditure would merely put the road in a fairly safe condition and does not contemplate putting it in a first-class condition, which would involve a very much greater outlay than is mentioned in Mr. Swanson's estimate.

"In going over the road it was perfectly apparent that travel upon it was unsafe. The defective condition of the ties, the leanness of the embankment, and the consequent sinking of the rail at the joint was very noticeable and occasioned feelings of apprehension for one's safety. Unless the suggested repairs are made it is merely a question of time when some serious accident will occur, no matter how good the management may otherwise be.

Repairs to Eight Locomotives, $7,000.

"Mr. Swanson tells me that these locomotives have not received a thorough overhauling for several years. Two machinists are employed in the shops at Walnut Springs, who can make necessary repairs to the locomotives, but the material necessary for these repairs must be purchased, and will cost somewhere in the neighborhood of the amount mentioned, $7,000.

"I do not agree with Mr. Swanson that three new locomotives are needed at present. If business picks up and more trains are required to attend to the business new locomotives will be necessary, but, pending the outcome of this season's business, I think
66 that the road can be carried on with its present supply of locomotives.

"In view, however, of the fact that that portion of the Texas Central road which runs from Garrett to Roberts has no equipment whatever of its own and has always used the equipment of the Houston and Texas Central road on a rental or mileage basis, three locomotives at least are needed, if intended for use on that portion of the road.

"It is undoubtedly true, as stated by Mr. Dillingham in his letter of November 9, that eight locomotives are not sufficient equipment for 178 miles of road, assuming that the earning capacity of the road is commensurate with its bonded indebtedness of $15,000 to the mile; but as the earnings for the last two years have not exceeded its operating expenses, I would recommend working with the present locomotive equipment until the revival of business along the line of the road makes additional equipment an essential.

"In other words, while additional equipment may be most desirable, it is not a matter of immediate necessity.

"*Rolling Stock*, $48,045.

"A large portion of the business of the Texas Central road at Albany is the shipment of cattle. The company has no stock cars and is obliged to ship all the cattle in borrowed cars, on which it pays mileage. Almost all the freight on this road is through freight and carried frequently as far as Kansas City, St. Louis, and New Orleans without change of cars. The result is that with the small equipment of the Texas Central road it is almost always without cars of its own on hand. I think that the purchase of some stock cars is essential to the economical operation of the road and to the convenience of the shippers, who are frequently obliged to delay cattle shipments until suitable cars for the purpose can be borrowed. Additional box cars are undoubtedly needed, but are not essential. The fact that no stock cars are coming into the country, but all going out, explains why the ownership of stock cars is of more importance than the purchase of additional box cars.

"I cannot say anything definite in regard to the repairs to the rolling stock, for which Mr. Swanson has made a requisition of about $14,000. He tells me that the cars have received but slight repairs since they have been on the road, and that the amount
67 of his requisition is very moderate. It was impossible to make investigation of the rolling stock, for the reason that most of it, as above stated, was not on the line of the road at the time of my visit.

"*Northeastern Division.*

"The northeastern division extends from Garrett to Roberts, a distance of fifty-two miles. We arrived at Roberts late at night and started from there on our inspection trip early in the morning. It was snowing hard, and after the first ten miles of road the track was so covered by snow that it was impossible to see the ties, but a careful inspection of the ties on the first ten miles, being the portion of the road last built, showed that they were in as bad, if not in worse,

condition than the ties on the northwestern division. Ties are somewhat cheaper at this point and can probably be bought for forty cents apiece instead of fifty, reducing the estimate for ties on this branch from $8,000 to $6,400.

"At Trinity bridge two stone piers are positively needed. The wooden piers to this bridge have been carried away three times, and the remarks in regard to the other bridges apply with equal force to this bridge at Trinity river. The foundation for the piers here is a difficult one and the cost will come quite up to the estimate.

"As I have said, this branch has no equipment of its own. Mr. Swanson very properly wants a combination coach for passengers and baggage.

"This branch is not in as good condition as the northwestern branch, owing to the fact that the foundation here is mud instead of gravel, and that there is no ballast within economical hauling distance. In rainy weather this mud foundation becomes very slippery and the track slides. Mr. Swanson tells me that it is almost impossible to keep the road in good condition with the means at his command. I can easily understand that this is the case, and in order to put that road in proper condition ballast must be brought to it in large quantities.

"The business over the road at present is so light that I would not recommend any very large outlay for this purpose, but it must be borne in mind that in order to get that road in reasonable condition a large amount of money must be spent for ballast.

"Very truly, CHARLES C. DEMING."

68 [Endorsed:] Supreme Court of U. S. October term, 1888. No. 4. Original. *Ex parte:* The Farmers' Loan and Trust Company, petitioner. In the matter of the Farmers' Loan and Trust Company *vs.* The Texas Central Railway Company *et al.* Return of the circuit court of the United States for the fifth circuit and northern district of Texas to the rule to show cause why a mandamus should not issue in the premises. J. Hubley Ashton, of counsel for the respondents.

69 [Endorsed:] Supreme Court U. S. 1888, October term. No. 4. Original. *Ex parte:* In the matter of the Farmers' Loan & Trust Company, petitioner. Return to rule. Filed Nov. 26, 1888.

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69 [Endorsed:] Supreme Court U. S. 1888, October term. No. 4. Original: *Ex parte:* In the matter of the Farmers' Loan & Trust Company, petitioner. Return to rule. Filed Nov. 26, 1888.

Chief Supreme Court U. S.
FILED.
DEC 17 1888
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 4, ORIGINAL.

Ex Parte THE FARMERS' LOAN AND TRUST COMPANY, Petitioner.

In the Matter of The FARMERS' LOAN AND TRUST COMPANY,

vs.

THE TEXAS CENTRAL RAILWAY ET AL.

BRIEF FOR THE RESPONDENTS.

J. HUBLEY ASHTON,
Of Counsel for Respondents.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM 1888.

No. 4—Original.

Ex Parte THE FARMERS' LOAN AND TRUST COMPANY,
Petitioner.

IN THE MATTER
of
THE FARMERS' LOAN AND TRUST COMPANY
vs.
THE TEXAS CENTRAL RAILWAY
ET AL.

Brief for the Respondents.

STATEMENT OF THE CASE.

The respondents are called upon to defend and support their action in refusing to allow the petitioner an appeal to this Court, from a certain order, or decree, made and entered by the Circuit Court of the United States for the Northern District of Texas, on May 26th, 1888, in a suit in equity, in that Court, wherein Morgan's Louisiana and Texas Railroad and Steamship Company is an original complainant, and The Farmers' Loan and Trust Company a cross-complainant, against The Texas Central Railway

Company, authorizing the joint receivers therein to borrow the sum of $120,000, and issue certificates or debentures therefor, the proceeds to be applied to the purpose of the necessary repairs and reconstructions of the property in their custody, recommended in the report of the Master therein, and ordering that such certificates and obligations, when issued, should become, and declaring them to be, a lien upon the railroad, and other property of the Texas Central Railway Company, including the net earnings thereof, after deducting the expenses of the receivership, and the operation of the road, such lien to be prior to all other liens except a lien for $25,000 of receiver's certificates theretofore allowed to be issued under orders of the Court. (Order of May 26th, 1888, Return, p. 28. Exhibit "G.")

The facts, disclosed by the record, are briefly these:

Morgan's Louisiana and Texas Railroad and Steamship Company, in April, 1885, filed a bill in equity in the Circuit Court of the United States for the Northern District of Texas, against the Texas Central Railway Company, claiming a lien upon its property paramount to that of the mortgage creditors, alleging the insolvency of the defendant corporation, and seeking the appointment of receivers to control and manage the property during the pendency of the suit.

The trustees of the various mortgagees were, by supplemental bill, made defendants in the cause.

Messrs. Benjamin G. Clarke and Charles Dillingham were appointed receivers by an order entered April 6th, 1885, and they have remained in possession and control of the property of the Texas Central Railway Company ever since. Their ability and integrity have never been questioned. (Return, p. 1.)

The Farmers' Loan and Trust Company, as the trustee in certain first mortgages upon the property, intervened

and answered the bill of the Morgan Company, and also filed a cross-bill to foreclose the mortgages, alleging, *inter alia*, that the mortgagor was insolvent; that in consequence of the embarrassed condition of its financial affairs it was impossible for the trustee under the mortgage deeds of trust to execute the trust in the manner specified therein without the aid of the Court; and that the trust could not be executed and the rights of the parties in interest be ascertained, and fully protected, otherwise than by a judicial sale of the mortgaged property. (Return, p. 1, fol. 3.)

The cross-bill, also, alleged that until such sale could be made and the proceeds distributed, it was expedient and necessary that all the rights, franchises, and property of the Texas Central Railway Company, continue to remain and be placed in the hands, and under the control, of receivers, with such proper powers and control over the same as to the Court should seem right and equitable to be conferred. (Return, p. 2, fol. 3.)

The order, appointing the receivers, *inter alia*, directed and required them, until the further order of the Court, to run, operate, and manage the railways of the Texas Central Railway Company, and to manage and control all of its property and affairs, and it authorized them to use the moneys of the Company for any and all of the purposes stated in the several provisions of the order. (Order appointing Receivers, Return, pp. 5–7, Exhibit "A.")

On April 11th, 1887, a final decree was entered, in the cause, adjudging, among other things, that Morgan's Louisiana and Texas Railroad and Steamship Company has an equitable lien upon the property of the Texas Central Railway Company for over $750,000, with interest, but the same is subordinate to the liens of the Farmers' Loan and Trust Company under its mortgage

deeds of trust, to the amount of over $4,000,000, with interest, and that in default of the payment of the latter amount, within a time fixed, the equity of redemption should be barred and foreclosed, and the property sold to the highest bidder for cash. (Decree, Return, pp. 7–18, Exhibit "B.")

Morgan's Louisiana and Texas Railroad and Steamship Company, and the Texas Central Railway Company, respectively, perfected supersedeas appeals to this Court from the above decree, which are numbers 631 and 633 on the Docket.

On February 15th, 1888, the receivers, who had necessarily remained in possession of the property, presented to the Circuit Court a petition, setting forth its dilapidated condition, and asking leave to borrow the sum of $120,000, for the purpose of making the absolutely necessary repairs therein described. (Petition of Receivers, Return pp. 19–21, Exhibit "C.")

By an order of the Court, of the same date, the petition was referred to the Special Master in the cause, with instructions to hear the same forthwith, after notice to the parties in interest, and report as soon as possible after such hearing; and it was directed that the report of the Master should stand for hearing after five days from the filing thereof, within which time the parties might have leave to file oppositions and exceptions. (Order on Receiver's Petition, Return, p. 21, fol. 39.)

On February 18th, 1888, the Farmers' Loan and Trust Company filed an answer to the petition of the receivers (1) denying the right of the Court to grant the prayer of the petition, and authorize the receivers to borrow any such sum as $120,000 for the purposes set forth in their petition, issuing as security therefor re-

ceivers' certificates, to be a lien on the railroad property, prior to the lien of the mortgages foreclosed in this cause, and the decree of the Court foreclosing the same, reserving all its rights in this particular, and saying that issuing certificates to any such amount and for the purposes set forth in the petition would amount to such betterment and reconstruction of the road as to go far beyond the power and authority of the Court; (2) stating that, as mortgagee in trust, it made this its formal objection on the record to the issuing of any certificates or evidences of indebtedness of any kind or description by the receivers, and to the creation of any preferred indebtedness purporting to have a lien on the mortgaged property superior to the lien of the mortgages and of the decree in this cause; and (3) stating that the respondent had filed a motion in this Court to advance the appeals, and that, if such petition was granted, a speedy sale of the mortgaged property could be had, and it would, in such case, be unnecessary to consider the allegations of the receivers in their petition. (Answer of the Farmers' Loan and Trust Company to petition of receivers to borrow $120,000, Return, pp. 21–23, Exhibit "D.")

On March 21, 1888, after hearing the parties, the Master filed his report, which substantially confirmed the averments of the receivers' petition. (Report of Special Master upon petition of receivers, Return, pp. 23–26, Exhibit "E.")

The Master's report, as stated in the return, found that the condition of the track of the Texas Central Railway Company, owing to rotten and defective cross-ties, is unsafe for traffic and passenger travel; that the necessity for the repair of this track was urged during the years 1886 and 1887 upon the receivers by the superintendent of the railway; that the condition of said track has been growing worse, and that a reasonable precaution for the

safety of passengers and the safe transportation of freight and a proper care for the rolling stock of the defendant railway company demands that the evil be remedied as far as practicable. It further finds the substantial facts with reference to the destruction of bridges, the temporary structures in their stead, and their liability to be washed away and destroyed; and further finds that the income from the property since the possession of the receivers has been barely sufficient to meet operating expenses, and that the receivers have no money or funds with which to make the repairs referred to in the petition. The Master therefore recommended that the prayer of the receivers be granted; that they be authorized to borrow so much of $120,000 as may be necessary to procure cross-ties, replace and repair bridges and piers, and to widen embankments where necessary to protect the ties, and that they be authorized to issue receivers' certificates therefor, to operate as a lien upon said railway second only to the twenty-five thousand dollars of receivers' certificates then outstanding, said certificates to be made payable on or before the expiration of two years from their date.

On March 21st 1888, the Farmers' Loan and Trust Company filed exceptions to the report of the Master upon the petition of the receivers for authority to issue certificates. (Exceptions to Report of Special Master, Return, pp. 26–27, Exhibit "F.")

The grounds of the exceptions were:

(1) That the Master had reported that only so much of the answer of the Trust Company as relates to the postponement of the consideration of the petition was urged before him, whereas the answer was filed with the Master, and the entire answer was entitled to consideration by him, particularly as it raised questions of right and power on the part of the Court.

(2) That the Master had recommended that unless it appeared that the receivers would soon cease to have the custody of the property, the prayer of their petition should be granted, and they be authorized to borrow so much of $120,000 as might be necessary to procure cross-ties, replace and repair bridges and piers, and widen embankments where necessary to protect the ties, &c., and that they be authorized to issue certificates therefor as a lien upon the railway.

(3) That the Master had recommended that certificates, if issued, be made payable on or before the expiration of two years from their date, whereas, if issued at all, they should be made payable on or before the expiration of three years from their date.

(4) That the Master had not reported that the Court has no right to grant the prayer of the petition and to authorize the petitioners to borrow any such sum as $120,000 for the purposes set forth in the petition, issuing as security therefor receivers' certificates, to be a lien on the railroad prior to the lien of the mortgages foreclosed in this cause and the decree of this Court foreclosing the same.

(5) That the Master had not found that in view of the fact that the respondent has filed a motion in the Supreme Court of the United States that said Court will advance the appeals from the decree entered in this cause upon its docket and hear such appeals at an early date, and the fact that if such petition is granted a speedy sale will be had of the mortgaged property and premises, and that it will in such case be unnecessary to consider the allegations made by the receivers in their said petition; therefore it is premature to consider the petition.

(6) That the Master had not found that the prayer of the petition should be denied.

On May 26th, 1888, the cause came on to be heard, by consent of parties, on the exceptions of the Farmers'

Loan and Trust Company to the Master's report, and the Court granted the order complained of, which is as follows:

This cause came on to be heard by consent of parties on the 26th day of May, 1888, before the Hon. Don A. Pardee, circuit judge, sitting in chambers, at the city of New Orleans, on the exceptions of the Farmers' Loan and Trust Company to the report of the special master herein filed March 21st, 1888, on the petition of the receivers to borrow one hundred and twenty thousand dollars herein filed on February 15th, 1888, and was argued by counsel; whereupon and on consideration thereof—

It is ordered, adjudged, and decreed that the exceptions of the said Farmers' Loan and Trust Company to the said Master's Report be overruled, and that the said Master's Report be confirmed; and it is further ordered, adjudged, and decreed that the joint receivers herein, Benjamin G. Clarke and Charles Dillingham, be authorized to borrow the sum of $120,000, for which sum they are authorized and empowered to issue certificates or debentures not to exceed $120,000 in amount, and each of said debentures or certificates to be for such amount as said receivers may deem proper, to bear a rate of interest not exceeding six per cent. per annum, to fall due, at the option of the receivers, on or before the expiration of two years from their date, and said receivers are authorized to sell said certificates at not less than par, the proceeds thereof to be applied to the purpose of the necessary repairs and reconstructions recommended in the report of the Master.

It is further ordered that said certificates and obligations, when issued, shall become, and they are hereby declared to be, a lien upon the road-bed, rolling stock, depots, and all other property of said railway company, including the net earnings thereof after deducting expenses of this receivership and the operation of the road, said lien to be prior to all other liens except the lien for $25,000 of receivers' certificates heretofore allowed, to be issued under orders of this Court.

It is further ordered that said certificates or debentures be substantially in the form following, to wit:

"Office receivers Texas Central Railway Company,

Benjamin G. Clarke and Charles Dillingham, joint receivers. Ross, Texas, ——— ——, 188–. Two years after date, or on or before the expiration of two years, at the option of the receivers, for value received, we, Benjamin G. Clarke and Charles Dillingham, as joint receivers of the property of the Texas Central Railway Company, do, under and by virtue of the power in us vested by an order of the Circuit Court of the United States in and for the Northern District of Texas, at Waco, made on the 28th day of May, 1888, in a certain cause wherein Morgan's Louisiana and Texas Railroad and Steamship Company is complainant and the Texas Central Railway Company *et al.* are defendants, No. 21 of the equity docket, hereby promises to pay at the —— Bank, in the City of New York, to bearer hereof —— dollars, with interest from date until paid at the rate of —— per cent. per annum.

"This obligation is one of a series, amounting to one hundred and twenty thousand ($120,000) dollars authorized by said Court to be made by us as receivers, and is, together with others of the same series, made and declared to be a lien upon the road-bed, rolling stock, depots, and all other property of the said railway company, of every nature and description, wheresoever situated, and also a lien upon the residue of the earnings, incomes, and profits of said property that there may be after deducting operating expenses, costs of repairs, and the expenses of our receivership, and said lien to be prior to all other liens except the lien of $25,000 of receivers' certificates heretofore issued under order of the said Court."

(Order in reference to the issuing of $120,000 Receivers' certificates, Return, p. 28, Exhibit "G.")

Subsequently, in June, 1888, the Farmers' Loan and Trust Company presented a petition for an allowance of an appeal from the above order of May 26th, 1888, said appeal to operate as a supersedeas, returnable to the Supreme Court at its October term, 1888. (Petition for allowance of appeal. Petition for rule to show cause, p. 11, Exhibit "A.")

The petition prayed that citations of appeal, in due form of law, might be directed to Morgan's Louisiana and Texas Railroad and Steamship Company, to the Texas Central Railway Company, and to the Metropolitan Trust Company of the City of New York, commanding them, and each of them, to appear and answer the appeal.

On June 12th, 1888, this application for appeal was denied by the Court, acting through the Circuit Judge, for the reasons set forth in its opinion in the record. (Opinion of Court refusing appeal, Return, pp. 29–30, Exhibit "H.")

The matter of the appeal was further heard before the Circuit Justice, who, in August, 1888, concurred in the order of the Circuit Judge. (Return, p. 31, fol. 58.)

Owing to the proceedings with reference to an appeal, the receivers have not executed the order of May 26th, 1888. (Return, p. 4, fol. 8.)

No contest was made, either before the Master or before the Court, by the petitioner, as to the fact of the deplorable condition in which the property in the custody of the Court was, and as to the necessity of making repairs upon it, according to the suggestion of the receivers. (Return. p. 4, fol. 8.)

Upon the hearing of the application of the receivers before the Master, a copy of the report of Charles C. Deming, employed by the bondholders to examine the road and make a report to them of its condition, was offered in evidence by the receivers, and was returned into Court by the Master, as part of the evidence before him. (Report of C. C. Deming. Return, pp. 31–36. Exhibit "I.")

The answer of the Judges of the Circuit Court states, that the position of the petitioner, The Farmers' Loan

and Trust Company, presented only the naked question of the power of the Court to preserve the property, pending the appeal, in its custody, for the benefit of whom it might concern.

The Judges of the Circuit Court concluded that it was their right and duty to preserve the property, necessarily in the possession of the Court, during the appeal, from destruction and deterioration, to keep it a going concern, and to preserve its franchises from forfeiture, and they are of opinion that the measures adopted by them to that end are necessarily discretionary.

The Judges were further of opinion that the order issued on the application of the receivers, granting them permission to borrow money and to issue receivers' certificates therefor, was an interlocutory order, from which the Farmers' Loan and Trust Company was not entitled to appeal, and against the effects of which said company had complete remedy by opposition to the final decree of distribution of the proceeds of the property in case said decree should contain a provision applying a part of the proceeds of sale, or a part of the revenue of the property in the hands of the Court, to the payment of the certificates, when issued, in the hands of the holders thereof (Return, p. 5.)

It is respectfully submitted, that the action of the Circuit Court, in refusing to allow the petitioner an appeal, as prayed, from the above order of May 26th, 1888, was lawful and right, and that the writ asked for by the petitioner should not be granted by this Court.

First.

The burden is upon the petitioner to show that it has a clear right to an appeal which has been refused by the Circuit Court.

1. Power to issue writs of mandamus to the courts appointed under the authority of the United States is conferred upon this Court by the 13th section of the Judiciary Act, now section 688 of the Revised Statutes, "in cases warranted by the principles and usages of law."

In the case of *Ex parte Cutting* (94 U. S., 19), being an application for a mandamus to the Circuit Court of the United States for the Eastern District of Missouri, to compel the allowance of an appeal, this Court, speaking by the late Chief Justice, said:

"To entitle the petitioners to the writ asked for in this case they must show that they have a clear right to an appeal which has been refused by the Circuit Court. The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance, and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default."

2. The writ will not be granted in favor of a party, asking the allowance of an appeal, unless he shows that he took the steps necessary to entitle him to an appeal, and that the amount in dispute is sufficient to give this Court jurisdiction.

Mussina *v.* Cavazos, 20 How., 289.
Ex parte B. & O. R. R. Co., 106 U. S., 5.
In re Burdette, 127 U. S., 771.

Second.

The petitioner is not entitled to a mandamus, in this case, unless the order of May 26th, 1888, standing alone, as it does, is a final decree, in the suit, within the meaning of section 692 of the Revised Statutes, by which the rights of the petitioner are injuriously affected, and it appears that the amount in dispute exceeds the sum or value of five thousand dollars, exclusive of costs.

1. Congress intended that a case should not be divided up into a plurality of appeals.

The Palmyra, 10 Wheaton, 502.
Forgay *v.* Conrad, 6 How., 205.
Beebe *v.* Russell, 19 How., 286.
Humiston *v.* Stainthorp, 2 Wall., 106.

Interlocutory orders, made in the progress of a suit, can come here only through, and upon, an appeal from a final decree.

Railroad Co. *v.* Soutter, 2 Wall., 521.
Ex parte Jordan, 94 U. S., 252.

Where a matter distinct from the general subject of litigation, arises in the progress of a suit in equity, the jurisdiction of this Court can be invoked only after a final decision and settlement of the right or claim involved, and the proceedings in relation thereto are ended.

Thus, a purchaser at a foreclosure sale may appeal from a decree affecting his interest, but only after the proceedings for the sale, under the original decree, are ended, and from the last decree which the Court can make in the case, and which dismisses the parties from further attendance upon the Court for any purpose connected with the action.

Blossom *v.* R. R. Co., 1 Wall., 655.
Butterfield *v.* Usher, 91 U. S., 248.

So, an appeal from orders allowing costs and expenses to a party suing on behalf of a trust fund, was sustained by this Court only upon the ground that the orders were a final determination of the particular matters involved, and directed the payment of the money out of the funds in the hands of the receiver.

Trustees *v.* Greenough, 105 U. S., 531.

So, also, where an appeal was taken from a decree, in a foreclosure suit, ascertaining and fixing the amount of compensation to be paid to the trustees, under the mortgage, from and out of the fund realized from the sale of the mortgaged property, the Court sustained the appeal, because the decree was a final decision and settlement of the right or claim involved.

Williams *v.* Morgan, 111 U. S., 684.

So, it would seem, also, where complaint is made of orders in the progress of a foreclosure suit, authorizing the issue of receivers' certificates, the parties who may be affected can appeal only after and from a final decree of distribution, in the cause, finding the amounts due upon such certificates, and directing their payment out of the proceeds of sale of the mortgage property.

Ex parte Jordan, 94 U. S., 251.
Wallace *v.* Loomis, 97 U. S., 146.
Miltenberger *v.* Railway Co., 106 U. S., 286.
Union Trust Co. *v.* Ill. Midland Co., 117 U. S., 434.

A decree distributing the proceeds of sale under a decree of foreclosure is a final decree upon which an appeal lies to this Court.

C. & V. R. R. Co. *v.* Fosdick, 106 U. S., 84.

2. The limitation of the right of appeal to cases where the matter in dispute exceeds the sum or value of $5,000,

"draws the boundary line of *jurisdiction*, and it is to be construed with strictness and rigor."

Elgin *v.* Marshall, 106 U. S., 580.

Farmers' Loan and Trust Co. *v.* Waterman, 106 U. S., 270.

Third.

It doth not appear that the order of May 26th, 1888, affects, or will affect, the rights or interests of the petitioner, or those whom, in equity, it represents, to an amount sufficient to give this Court jurisdiction, or to any amount, and no appeal therefrom is, therefore, allowable.

1. The order is an administrative order for the preservation of the property as a trust fund for those entitled to it, and the maintenance of the railroad, and its structures, in a safe and proper condition to serve the public. (Wallace *v.* Loomis, 97 U. S., 146; Union Trust Co. *v.* Ill. Midland Co., 117 U. S., 456.)

No foundation for any claims, adverse to the mortgage creditors, and their rights, can exist until certificates are issued under the order, and, as no certificates have been issued, there would seem to be no ground upon which it can be said that those creditors have been, or are, subjected to injury, or prejudice, by reason of the order.

It would appear impossible to tell, judicially, what amount of certificates the receivers will be able to issue, and, therefore, what interests, adverse to those of the mortgage bondholders, will or may arise under the order, or the amount and extent in money of such interests.

In the present situation of the matter, it may be also observed, in this connection, there would seem to be no parties who could be designated as proper *appellees* in any appeal from the order in controversy.

The petition for appeal asks that citations of appeal may be directed to Morgan's Louisiana and Texas Railroad and Steamship Company, the Texas Central Railway Company, and the Metropolitan Trust Company of New York. (Petition, Exhibit "A," p. 12.)

It is not perceived, however, that these companies can be said to be parties to the decree, in interest adverse to the interest of the petitioner, or its constituent bondholders, or that they would be properly appellees in an appeal from the order, if such an appeal were allowable.

The companies whom it is proposed to cite, as appellees, in an appeal from the present order, in fact, have no legal interest in maintaining the validity of the order.

The receivers, of course, act as the representatives of the Court in all matters pertaining to the preservation of the property, and they are interested only in keeping the property so that it may be subjected to any decree that shall finally be rendered against it.

It would appear, therefore, that the receivers could not be designated, as appellees, in an appeal from the present order.

It seems clear, in fact, that the holders of certificates, issued under the order, would be alone interested in maintaining its validity, and that they would be the proper parties to be cited as appellees, in any appeal by the mortgage bondholders from any final decree, which should allow the payment of their respective claims by preference out of the proceeds of a sale of the property.

2. If receivers' certificates had been issued, under the order in controversy, it would be impossible, we suppose, to tell whether the mortgage creditors would be injuriously affected, and, if so, to what sum or amount, by reason of the order, and the action of the receivers under it, until the fund for distribution should be ascertained, the

amounts of the claims of the respective holders of such certificates to priority of lien upon the fund determined, and the results of a final decree of distribution known.

In the end, it might well appear that the amount or sum involved in any dispute between the bondholders and the several and respective holders of the receivers' certificates, as to the lien of the certificates upon the trust fund, was less than the sum necessary to give this Court jurisdiction of the controversy.

The object of a decree for foreclosure is a sale of the property in order that the proceeds may be applied to the debt; and if the mortgage bondholders, in this case, should be able in the end to make their debt, by a sale, under the foreclosure decree, it seems that they would have no legal ground of complaint against the action of the Court in authorizing the issue of receivers' certificates, or against any decree which should finally give such certificates priority to other liens.

At all events, it does not appear now that the petitioner, and the creditors secured by the mortgages it represents, have any such interest, in the matter involved in the present order, as would entitle them, in any view, to invoke the jurisdiction of this Court by appeal from the order.

Fourth.

The order of May 26th, 1888, as it stands, is an administrative order, relating to a matter within the domain of the discretion of the Circuit Court, with which this Court will not interfere, and it is not, therefore, the subject of an appeal to this Court.

1. The question presented is as to the legal nature and character of the order, standing *alone*, as it does, and before and without confirmation by any adjudication of the Circuit Court, recognizing loans made under it, and

giving them priority of lien in the distribution of the trust funds.

That the order, in its present situation and relation, is to be deemed an administrative order, not involving the exercise of what this Court has called "*judicial judgment*," and not impugnable for what has been termed "*judicial error*," appears to follow from the juridical character of the protective powers of Courts of Chancery in the case of trust funds, the nature and objects of such orders, as well as from what this Court has said, on several occasions, touching the power of Courts of Equity, by such orders, to preserve such property when in its hands as a trust fund.

The protective and administrative functions of Courts of Chancery are as old as those Courts themselves.

(1 Spence's Equitable Jurisdiction of the Court of Chancery, 377–381; additional note to chapter 6, where the author speaks of the "*protective* and *administrative* functions of the Court, as for securing the property in dispute, for receivers, for the payment of money into Court, for references for the letting and management of trust estates, for guardians, and for allowances for maintenance," &c.)

The Circuit Court, in making the present order, was plainly occupied with the *business* of providing the ways and means for the preservation of the property, and was not engaged in adjudicating the rights of any parties to the suit.

The order determines that it is necessary to borrow moneys to preserve the property, and that to obtain the loans it is necessary to give them a paramount lien on the trust fund.

The power to give priority of lien to the receivers' certificates, in such a case, is only a necessary means of

enabling the Court to procure the money, and of enabling it to preserve and protect the property.

Without that power, the power of the Court to preserve and protect the property would be nugatory and incapable of execution.

The Circuit Court, therefore, in giving the receivers' certificates priority of lien on the trust fund, was, in fact, in the use and exercise only of the administrative functions vested in it by law for the preservation, protection and management of the property in its custody.

The order, indeed, relates only to the business which the Court is obliged to carry on, through its officers, in the performance of its duty to take care of and manage the property, pending the litigation, and it would certainly seem that the Court must be entitled to exercise its discretion in the conduct of such business, if such a thing as discretion is to exist in an inferior Court at all.

The property is not brought into the Appellate Court by the appeal from the existing decree of forclosure, and the Circuit Court has still upon it the duty, and must exercise the power, to preserve the property. (Bronson *v.* La Crosse R. R., (1 Wall., 410.)

In a foreclosure suit, until the litigation is ended, it does not appear that there must be a sale, or even that the plaintiff is entitled to a sale. (Kountze *v.* Omaha Hotel Co., 107 U. S., 393.)

In the meantime, however, it is the duty af the Court to "make such repairs as are necessary to keep the road in a safe and proper condition to serve the public." (Blatchford, J., in *Union Trust Co.*, v. *Ill. Midland Co.*, 117 U. S., 456.)

Obviously, it would be impracticable for the Circuit Court to perform its duty in that regard, if its orders for

the preservation of the property could be rendered inoperative, as soon as made, by supersedeas appeals.

The practical effect of such a system would be to "paralyze the arm of the Court in the discharge of its duty," and deprive the property of that protection which it requires in its present predicament.

2. The views thus expressed as to the purely administrative character of the order of May 26th, 1888, as it stands, are in conformity, as we suppose, to the doctrines upon this subject, stated by Mr. Justice Bradley, speaking for the Court, in the leading case of *Wallace* v. *Loomis* (97 U. S., 146), and further expounded by Mr. Justice Blatchford in *Union Trust Company* v. *Illinois Midland Company* (117 U. S., 455, 456.)

The language of Mr. Justice Bradley, in the former case, and quoted with approval in the latter case, is as follows:

"The power of a Court of Equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the Court, by which it is its duty to preserve and protect the trust fund in its hands. It is undoubtedly, a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund."

The power of a Court of Equity, in the case of property of the character, and in the predicament, described, to borrow money for the preservation of the property, and make the loans a paramount lien thereon, seems here to

be plainly included in the protective and administrative functions of the Court, and embraced by the same jurisdiction as its power to appoint managing receivers of such property, which is understood to belong to the discretion of the Court having the custody of the trust fund.

That consent is desirable, where the power is exercised, indicates that it cannot be deemed a part of the general jurisdiction of the Court, for judicial power, where it may be lawfully exercised, is exerted independently of and without regard to the consent of the parties.

This is the very essence of judicial power.

3. The case, however, is different, when such an order has been executed, and claims arising upon the receivers' certificates, issued under it, are presented for allowance against the property, with priority of lien over the mortgage bonds, and the Court is required to adjudicate the right of the parties before it to the payment of their claims by preference out of the proceeds of the sale of the property.

The adjudication of the Court with respect to the relative priorities and equities among the lien-claimants upon the trust fund, for the purposes of the distribution of that fund, is a *judicial* decree, and when final, a final decree, which becomes the lawful subject of appeal to this Court, if the amount in dispute is sufficient to give it jurisdiction of the controversy between the parties.

Such a decree, for the first time, and finally, decides the title and right to the property in dispute, between those who have made themselves parties to the suit, and is a "final" decree within the letter of the rule in the case of *Forgay* v. *Conrad* (6 How., 204).

The administrative power of the Court as to the matters decreed in the order, ends when it has passed the order,

and its judicial power begins when it proceeds to determine the claims of the respective holders of the receivers' certificates, and adjudicate their right to payment out of the proceeds of sale, before the mortgage bonds.

3. It is, therefore, respectfully submitted that the order in controversy, standing, as it does, alone, is an administrative order, which is not subject to the revisory power of this Court, and that it cannot be brought within the judicial cognizance of this Court, at the instance of the petitioner, until and unless confirmed by a final decree of distribution, recognizing the loans, made under it, as a paramount lien on the trust fund, and the petitioner is allowed an appeal to this Court from such final decree.

Fifth.

The order of May 26th, 1888, is not final in the sense of that word in its relation to appeals, and is strictly an interlocutory order, in the cause, and not a final decree, therein, from which an appeal lies to this Court.

1. No decree can amount to a "final" decree upon which an appeal lies to this Court, unless it is a final judicial determination of the merits of the case, or of the matter embraced by the decree, terminating the litigation between the parties, and leaving nothing to be done but to carry what has been decreed into execution.

This is the principle of the earlier, as well as the late, decisions of this Court upon the subject.

The early decisions were cited and affirmed by the Court in its opinion in *Humiston* v. *Stainthorp*, (2 Wall., 106,) delivered by Mr. Justice Nelson.

It was, in that case, decided in 1864, that the Court reaffirmed its decision, in *Barnard* v. *Gibson*, (7 How., 650,) in 1848, that a decree, in a patent cause, for a perpetual injunction, and a reference to a Master to take an

account of profits, is not a final decree from which an appeal lies to this Court.

Mr. Justice McLean, in his opinion in the latter case, distinguished such a decree from the decree in *Forgay* v. *Conrad*, decided the year before, upon the ground mainly that, although the injunction was made perpetual, the damages by reason of the infringement remained to be determined and settled by the Court.

The later cases have adhered to the rule that a decree cannot be said to be final until the Court has completed its adjudication of the cause, or the distinct matter involved, leaving nothing to be done that is not ministerial, and that if anything judicial is left for the Court, the decree is not final, so as to authorize an appeal.

Thus, in *R. R. Co.* v. *Swasey* (23 Wall., 405), the decree declared that certain property was subject to a *lien*, enforceable by a sale, if payment of the debt was not made, and the Master was directed to state an account of the debt and the property affected by the lien. As those matters remained to be settled before the litigation could be said to be at an end, the Court held that the decree was an interlocutory, and not a final, decree.

So, in *Butterfield* v. *Usher* (91 U. S. 248), it was held that a purchaser at a sale, under a decree in equity, cannot appeal to this Court until the proceedings for the sale under the original decree are ended.

The Chief Justice, in that case, explained the decision of the Court in *Blossom* v. *R. R. Co.*, (1 Wall., 655; 3 Wall., 196) by saying:

"The decree against Blossom was the last which the Court could make in the case. It ended the proceedings, and dismissed the parties from further attendance upon the Court for any purposes connected with the action."

So, in *Grant* v. *Phœnix Ins. Co.* (106 U. S., 431), a decree which adjudged the title of the appellee to a debt, secured by deeds of trust, and referred the case to an Auditor to ascertain the amount due upon the debt, the amount due judgment and lien creditors, and the existence and priority of liens, and the claims for taxes, was decided to be an interlocutory, and not a final, decree.

The late Chief Justice there observed that the Court only followed the principle acted on in its early decisions on the subject of final decrees.

The rule was again stated, in the same way, at the the same term, in *Bostwick* v. *Brinkerhoof*, (106 U. S., 4.)

So, in *Green* v. *Fisk* (103 U. S., 518), a decree for partition, which referred the case to a Master to proceed to partition under the direction of the Court, was held to be only an interlocutory decree.

The Court, speaking by the late Chief Justice, there said:

"A decree cannot be said to be final until the Court has completed its adjudication of the cause. * * * In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds is a final decree for the purpose of an appeal. The reason is that in such a case the sale is simply the execution of the decree of the Court, and simply enforces the rights of the parties. Here, however, such is not the case, because still the Court must act judicially in making the partition. What remains to be done is not ministerial, but judicial."

The long-standing rule was again stated and applied in the recent cases of *Parsons* v. *Robinson*, (122 U. S., 115,) and *Railway Co.* v. *Simmons*, (123 U. S., 54.)

The late Chief Justice, in the latter case, said:

"The right of the junior mortgagee to redeem the prior mortgage has been established, but the amount he

must pay has not been determined. The validity of his lien has been declared, but what the amount is has not been fixed. His right to a sale of the mortgaged property in case the debt is not paid has been settled, but a sale cannot be made until a further order to that effect is entered. The litigation has not been ended; the terms of the redemption have not been fixed, and the foreclosure sale awaits the further judicial action of the Court."

2. It is respectfully submitted, upon these authorities, that the present order of the Circuit Court is an interlocutory order; and that there can be no final decree, in the cause, as to the matters, involved in the order, which can be brought here by the petitioner, until the Court, in the end, shall finally settle and determine the claims of the respective holders of the receivers' certificates, and the amounts thereof, and finally adjudge and order their payment from and out of the trust fund, before the mortgage bonds.

This it can only do by its final decree of distribution, in the cause, from which the petitioner will be entitled to appeal, if the amounts of the claims, arising upon the receivers' certificates, allowed with priority against the proceeds of sale, shall be sufficient to give this Court jurisdiction, and the mortgage bondholders are injuriously affected by such decree.

It may transpire, as we have said, that the mortgage bondholders are not prejudiced, or affected, in any manner, by the receivers' certificates, or the claims founded thereon; and in that case they would have no right or occasion to appeal from the decree of distribution.

They would be entitled, in any event, only to the payment of their bonds—nothing more.

If the Court should finally adjudge that the receivers' certificates, issued under the order, are entitled to be paid, with priority, it would still have to determine

whether each one of the claimants has a claim which is entitled to be paid in that manner.

In determining this question, each claim will depend, in the end, upon its own facts, to be ascertained by the Court on final hearing; and a recovery by one claimant will not necessarily involve a recovery by another.

The mortgage bondholders will have the right to contest each claim separately upon its merits.

At the final hearing of the claims against the property, the petitioner and its mortgage bondholders may contest the power of the Court to make the present order, and the validity, effect, necessity, and amount of the receivers' certificates, and the Court will have the right to determine those questions finally when it comes to make its decree of distribution.

Where the trustee of the bondholders, in a foreclosure suit, consents to or acquiesces in an order of the Court making the receivers' certificates a first lien on the property, the bondholders may not be able afterwards to deny the power of the Court to act in making the order, so far as the interests of third parties acting on the faith of the order might be affected. (Wallace *v.* Loomis, 97 U. S., 163; Union Trust Co. *v.* Ill. Midland Co., 117 U. S., 455; Humphreys *v.* Allen, 101 Ill., 500.)

But where the mortgage trustee has not consented to the order, and has formally denied, as in this case, the power of the Court to act in making it, we apprehend, the bondholders are not precluded from afterwards contesting the validity and effect of the receivers' certificates as a charge upon the property, superior to the lien created by the first mortgages, and the Court must adjudicate those questions, when presented for determination, before making its final decree of distribution.

It is well settled that receivers' certificates are not negotiable instruments, and that purchasers of such securities are bound to take notice of the orders, under which

they were issued, and the records of the Court with regard to them, which are always accessible to lenders and subsequent holders. (Stanton *v.* A. & C. R. R. Co., 2 Woods, 506, 512; approved, Union Trust Co. *v.* Ill. Midland Co., 117 U. S., 456, 461; Swann *v.* Wright's Executor, 110 U. S., 599; Turner *v.* R. R. Co., 95 Ill., 134; Beach on Receivers, Sec. 396. *et seq.*)

The Court must judicially determine, in each case, on the final hearing as to the claims presented for allowance against the trust fund, and when questions upon the validity and merits of such an order for the issuing of receivers' certificates are sought to be litigated, whether the mortgage trustee and the bondholders have so consented to or acquiesced in the order as to be precluded in equity from contesting the right of the certificate holders to the payment of their claims, with priority, out of the proceeds of the sale of the property.

Clearly, therefore, what remains to be done, by the Circuit Court, is not ministerial, but judicial, and that until the claims of the respective holders of the receivers' certificates are finally settled and determined, and the trust fund is ordered to be distributed according to such determination, the Court has not completed its adjudication of the matters involved in the present order, and of the rights of the parties in controversy in respect thereto.

Sixth.

It would appear to be settled by adjudication and practice that an order, in a foreclosure suit, for the issuing of receivers' certificates, the same to be a first lien on the property, is an interlocutory order, which can be brought here only by an appeal from a final decree of distribution.

Ex parte Jordan (94 U. S,, 252) was an application for a *mandamus* to the Circuit Court of the United States for

the Southern District of New York to compel the allowance of an appeal, to certain intervening bondholders, in a foreclosure suit, from a decree of sale and distribution in the cause, directing the proceeds of the sale of the property to be applied, in part, to the payment of certain receivers' certificates, issued under previous orders of the Court, making the certificates a first lien on the property, by which the parties claimed to be aggrieved.

The Court awarded the writ; designating the orders as to the receivers' certificates, and the other orders, complained of by the petitioners, as "*interlocutory orders*," and holding that the appeal had been properly prayed for only from the decree of distribution, as the "final decree."

The late Chief Justice said:

"While complaint is made of interlocutory orders entered in the progress of the cause, the appeal lies and was issued only from the final decree. Whatever comes here comes through such an appeal."

In *Wallace* v. *Loomis* (97 U. S. 159) the appeal which brought the case to this Court was from a final decree of foreclosure and sale, which adjudged the payment of certain receivers' certificates, issued under a previous order of the Court, out of the proceeds to arise from the sales, with priority.

There was no appeal taken from the order authorizing the receivers to raise money by loan, and declaring that such loan should be a first mortgage on the property, payable before the first mortgage bonds.

The Court examined that order as an interlocutory order, which was brought here by the appeal from the the final decree of sale and distribution.

In the case of *Union Trust Co.* v. *Ill. Midland Co.*, (117 U. S., 451,) the appeals on the part of the bondholders were taken from the decree of the Circuit Court, confirm-

ing the report of the commissioner appointed to investigate and report as to the receivers' certificates, and their liens on the property, and making specific adjudications as to the validity and status of eighteen different series of receivers' certificates, &c., and from the final decree of the Court, which disposed of the questions litigated, and provided for a sale of the mortgaged property and the distribution of the proceeds.

Appeals were also taken from the final decree of sale and distribution by holders of certain receivers' certificates.

The Court, upon these appeals, determined the controversy as to the receivers' certificates.

Seventh.

The mandamus asked for should be denied.

J. HUBLEY ASHTON,
Of Counsel for the Respondents.